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WASHINGTON REPORTS

VOL. 48

CASES DETERMINED

IN THE

SUPREME COURT

OF

WASHINGTON

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DECEMBER 3, 1907 — MARCH 17, 1908

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JUDGES  
OF THE  
SUPREME COURT OF WASHINGTON  
DURING THE PERIOD COVERED IN THIS VOLUME

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HON. RALPH O. DUNBAR

HON. MARK A. FULLERTON

HON. WALLACE MOUNT

HON. FRANK H. RUDKIN

HON. MILO A. ROOT

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**TABLE**  
**OF**  
**CASES REPORTED**

---

	<i>Page</i>
Abraham, Oregon & Washington Railroad Company v.	699
Abraham, State ex rel. Oregon & Washington Railroad Company v. ....	215
Agnew v. Barto & Son's Bank. ....	66
Akin v. Bradley Engineering & Machinery Company..	97
Allen v. Treat. ....	552
American Investment & Improvement Company, Kelso v.	5
Ames v. Farmers and Mechanics Bank. ....	328
Aylmore v. Seattle. ....	42
Baldwin v. Brown. ....	303
Barclay v. Puget Sound Lumber Company. ....	241
Barto, Duteau v. ....	207
Barto & Son's Bank, Agnew v. ....	66
Bartruff, Bogard v. ....	15
Beacon Place Company, Welch v. ....	449
Beyer, Holly Street Land Company v. ....	422
Blangy v. Sylvester. ....	699
Board of Commissioners of Pacific County, State ex rel. Espy Estate Company v. ....	230
Board of Commissioners of Pierce County, State ex rel. Funke v. ....	461
Bogard v. Bartruff. ....	15
Boulais, Gennelle v. ....	310
Bounds, Briggs v. ....	579
Bradley Engineering & Machinery Company, Akin v. ...	97
Bradshaw, Gault v. ....	364
Briggs v. Bounds. ....	579

	<i>Page</i>
Bright v. Hanover Fire Insurance Company.....	60
Brown, Baldwin v.....	303
Brown v. Kinney.....	448
Brown v. Trimble.....	270
Bryant Lumber & Shingle Mill Company v. Pacific Iron & Steel Works .....	574
Buchanan, Richter v.....	32
Budlong v. Budlong.....	645
Butler v. Supreme Court of The Independent Order of Foresters .....	147
Canady v. Knox.....	685
Carlson v. Curren.....	249
Carlson, Nelson v.....	651
Carroll, North Pacific Lumber Company v.....	163
Casey, Owen v.....	673
Chehalis River Lumber Company, Cook v.....	619
Chicago Lumber & Coal Company v. McCann.....	174
Clapsaddle, Natsurhara v.....	698
Clarke County, Portland and Seattle Railway Company v. ....	509
Collins v. Huffman.....	184
Columbia Valley Railroad Company v. Portland & Seat- tle Railway Company.....	472
Connelly, Spokane Interurban Railway Company v....	515
Conner, Johnson v.....	431
Connolly, Eaid v.....	584
Constantine, State v.....	218
Cook v. Chehalis River Lumber Company.....	619
Cooper, Holman v.....	24
Corbin, Greenwood v.....	357
Cowles, Whitehouse v.....	546
Cox v. Dickie.....	264
Cozard v. Cozard.....	124
Curren, Carlson v.....	249
Davis v. Northwestern Mutual Fire Association.....	50
Dean v. Walla Walla.....	75

# CASES REPORTED.

vii

	Page
Debritz, Taylor v.....	373
Degginger v. Martin.....	1
Dickey v. Maddux.....	411
Dickie, Cox v.....	264
Dickson, Reynolds v.....	407
Doak, Nichols v.....	457
Donaldson v. Winningham.....	374
Doty Lumber & Shingle Company, Shields v.....	679
Duteau v. Barto.....	207
Eaid v. Connolly.....	584
Farmers and Mechanics Bank, Ames v.....	328
Fenlon, Gullickson v.....	503
Fitzhenry, State ex rel. Tatum v.....	130
Foley v. McDonnell.....	272
Ford v. Heffernan Engine Works.....	315
Ford v. Smith.....	398
Fuller & Company v. Harris.....	519
Gaffner, Shipley v.....	169
Gault v. Bradshaw.....	364
Gennelle v. Boulais.....	310
German Savings and Loan Society, Hidden v.....	384
Gerrick, McClellan v.....	524
Graham, Pigott v.....	348
Granger, Gray v.....	442
Graves v. Graves.....	664
Gray v. Granger.....	442
Great Northern Lumber Company, Johnson v.....	325
Great Northern Railway Company, Harris v.....	437
Great Northern Railway Company v. Snohomish County	478
Greek Boys' Mining Company, Pearce v.....	38
Greenwood v. Corbin.....	357
Gullickson v. Fenlon.....	503
Hall, Hatch v.....	109
Hanover Fire Insurance Company, Bright v.....	60
Hanson, Sylliaasen v.....	608

	<i>Page</i>
Hapeman v. McNeal.....	527
Harris, Fuller & Company v.....	519
Harris v. Great Northern Railway Company.....	437
Hastings Shingle Manufacturing Company, Olmstead v.	657
Hatch v. Hall.....	109
Heffernan Engine Works, Ford v.....	315
Heim v. Neubert.....	587
Hendelman v. Kahan.....	549
Henderson, Kershner v.....	228
Hidden v. German Savings and Loan Society.....	384
Hillman Investment Company, Williams v.....	695
Hoff v. Japanese-American Fertilizer & Fisheries Com- pany .....	581
Hoffman v. Titlow.....	80
Holburte's Estate, In re.....	378
Holly Street Land Company v. Beyer.....	422
Holman v. Cooper.....	24
Housekeeper v. Livingstone.....	209
Huffman, Collins v.....	184
Humbird Lumber Company, Olson v.....	136
Hyde v. Seattle Electric Company.....	393
Idaho and Washington Northern Railroad, Lund v....	453
Inland Empire Railway Company v. McKinley.....	675
In re Holburte's Estate .....	378
In re McKeever's Estate .....	429
In re Oregon & Washington Railroad Company.....	699
In re Robinson .....	153
In re Sullivan's Estate .....	631
Japanese-American Fertilizer & Fisheries Company, Hoff v. ....	581
Johnson v. Conner.....	431
Johnson v. Great Northern Lumber Company.....	325
Johnson, Matson v.....	256
Jonas, State v.....	133
Joyce, Kendall v.....	489

# CASES REPORTED.

ix

Page

Kahan, Hendelman v.....	549
Kalama Driving Company, Kalama Electric Light & Power Company v.....	612
Kalama Electric Light & Power Company v. Kalama Driving Company .....	612
Kaufman, Ross v.....	678
Keith, State v.....	77
Kelso v. American Investment & Improvement Company	5
Kendall v. Joyce.....	489
Kershner v. Henderson.....	228
Kester v. School District No. 34 of Walla Walla County	486
Kinney, Brown v.....	448
Knox, Canady v.....	685
Lake, Wright v.....	469
Lake Washington Mill Company, Waight v.....	402
Lange v. Reservation Mining & Smelting Company...	167
Lanham v. Wenatchee Canal Company.....	337
Larson v. Lorer.....	551
Lease, Pederson v.....	253
Lester, McLean v.....	213
Livingstone, Housekeeper v.....	209
Lobb v. Seattle, Renton & Southern Railway Company.	238
Loomis, Waring v.....	541
Lorer, Larson v.....	551
Loving v. McPhail.....	113
Lund v. Idaho and Washington Northern Railroad...	453
McCann, Chicago Lumber & Coal Company v.....	174
McCart v. Racine Woolen Mills, Blake & Company....	314
McClellan v. Gerrick.....	524
McDonnell, Foley v.....	272
McFadden, State v.....	259
McKeever's Estate, In re.....	429
McKinley, Inland Empire Railway Company v.....	675
McLean v. Lester.....	213
McMillan v. Walker.....	342

	<i>Page</i>
McMillan, Wilson v.....	378
McNeal, Hapeman v.....	527
McOwen v. Seattle Electric Company.....	362
McPhail, Loving v.....	113
Maddux, Dickey v.....	411
Marfaudille, State v.....	117
Martin, Degginger v.....	1
Matson v. Johnson.....	256
Meeker v. Winyer.....	27
Melgard, Presby v.....	689
Merchant, State v.....	69
Merrill v. O'Bryan.....	415
Merriman v. Thompson.....	500
Minneapolis Threshing Machine Company, Rogers v...	19
Moore v. Scharnikow.....	564
Moran Brothers Company v. Pacific Coast Casualty Company .....	592
Morris v. Warwick.....	426
Morse, Sudden & Christenson v.....	101
Natsurhara v. Clapsaddle.....	698
Nelson v. Carlson.....	651
Nethercutt, State v.....	105
Neubert, Heim v.....	587
Nichols v. Doak.....	457
Nichols, State ex rel. University Lumber & Shingle Company v.....	605
Nolan, Port Townsend Southern Railroad Company v..	382
North Coast Railway v. Northern Pacific Railway Co..	529
Northern Pacific Railway Company, North Coast Rail- way v. ....	529
North Pacific Lumber Company v. Carroll.....	163
Northwestern Mutual Fire Association, Davis v.....	50.
O'Bryan, Merrill v.....	415
O'Connor v. Slatter.....	493
Olmstead v. Hastings Shingle Manufacturing Company	657

# CASES REPORTED.

xi

	<i>Page</i>
Olson v. Humbird Lumber Company.....	136
O'Neil, Victor Safe & Lock Company v.....	176
Oregon & Washington Railroad Company, In re.....	699
Oregon & Washington Railroad Company v. Abraham.	699
Oudin & Bergman Fire Clay Mining and Manufacturing Company, State ex rel. Conlan v.....	196
Owen v. Casey.....	673
 Pacific Coast Casualty Company, Moran Brothers Com- pany v. ....	592
Pacific Iron & Steel Works, Bryant Lumber & Shingle Mill Company v.....	574
Pearce v. Greek Boys' Mining Company.....	38
Pederson v. Lease.....	253
Peirce, Perkins v.....	380
Perkins v. Peirce.....	380
Peterson v. Union Iron Works.....	505
Peterson v. Weist.....	339
Peyser v. Western Dry Goods Company.....	55
Pigott v. Graham.....	348
Portland & Seattle Railway Company, Columbia Valley Railroad Company v.....	472
Portland and Seattle Railway Company v. Clarke County .....	509
Port Townsend Southern Railroad Company v. Nolan.	382
Presby v. Melgard.....	689
Preston Mill Company, Wikstrom v.....	164
Puget Sound Lumber Company, Barclay v.....	241
 Racine Woolen Mills Blake & Company, McCart v.....	314
Redfield v. School District No. 3 of Kittitas County...	85
Renard v. Spokane.....	345
Reservation Mining & Smelting Company, Lange v....	167
Reynolds v. Dickson.....	407
Richter v. Buchanan.....	32
Ridpath, Spokane Stamp Works v.....	370
Ridpath v. Spokane Stamp Works.....	320

	<i>Page</i>
Roberts, Tipton v.....	391
Robinson, In re.....	153
Robinson Manufacturing Company, Tergeson v.....	294
Rogers v. Minneapolis Threshing Machine Company...	19
Ross v. Kaufman.....	678
Scharnikow, Moore v.....	564
School District No. 3 of Kittitas County, Redfield v...	85
School District No. 34 of Walla Walla County, Kester v.	486
Seattle, Aylmore v.....	42
Seattle v. Seattle Electric Company.....	599, 700
Seattle Brewing & Malting Company, Thomas v.....	560
Seattle Electric Company, Hyde v.....	393
Seattle Electric Company, McOwen v.....	362
Seattle Electric Company, Seattle v.....	599, 700
Seattle Electric Company, Tenny v.....	150
Seattle Renton & Southern Railway Company, Lobb v.	238
Seattle Renton & Southern Railway Company, Walters v.	233
Seright, State v.....	307
Shields v. Doty Lumber & Shingle Company.....	679
Shipley v. Gaffner.....	169
Simpson, Stiles v.....	301
Slatter, O'Connor v.....	493
Smith, Ford v.....	398
Smith-Premier Typewriter Company, Stone v.....	204
Snohomish County, Great Northern Railway Company v.	478
Spokane, Renard v.....	345
Spokane Falls & Northern Railway Company v. Stevens County .....	699
Spokane Interurban Railway Company v. Connelly....	515
Spokane Stamp Works, Ridpath v.....	320
Spokane Stamp Works v. Ridpath.....	370
State v. Constantine .....	218
State v. Jonas .....	133
State v. Keith .....	77
State v. McFadden .....	259
State v. Marfaudille .....	117

# CASES REPORTED.

xiii

Page

State v. Merchant .....	69
State v. Nethercutt .....	105
State v. Seright .....	307
State v. Thompson .....	683
State v. Von Shultz .....	698
State v. Walker .....	8
State v. Winnett .....	93
State v. Wiseman .....	697
State ex rel. Burrows v. Superior Court, Chehalis County .....	277, 286
State ex rel. Conlan v. Oudin & Bergman Fire Clay Mining and Manufacturing Company.....	196
State ex rel. Espy Estate Company v. Board of Com- missioners of Pacific County.....	230
State ex rel. Funke v. Board of Commissioners of Pierce County .....	461
State ex rel. Holcomb v. Yakey.....	419
State ex rel. Korsstrom v. Superior Court, King County .....	671
State ex rel. Oregon & Washington Railroad Com- pany v. Abraham.....	215
State ex rel. Speckart v. Superior Court, Thurston County .....	141
State ex rel. Tatum v. Fitzhenry.....	130
State ex rel. Thompson v. State Board of Dental Ex- aminers .....	291
State ex rel. University Lumber & Shingle Company v. Nichols .....	605
State Board of Dental Examiners, State ex rel. Thomp- son v. ....	291
State Board of Medical Examiners, Stewart v.....	655
Stephens, Ulrich v.....	199
Stevens County, Spokane Falls & Northern Railway Company v. ....	699
Stewart v. State Board of Medical Examiners.....	655
Stiles v. Simpson.....	301

	<i>Page</i>
Stone v. Smith-Premier Typewriter Company.....	204
Sturgeon v. Tacoma Eastern Railroad Company.....	366
Sudden & Christenson v. Morse.....	101
Sullivan's Estate, In re.....	631
Superior Court, State ex rel. Burrows v.....	277, 286
Superior Court, State ex rel. Korsstrom v.....	671
Superior Court, State ex rel. Speckart v.....	141
Supreme Court of The Independent Order of Foresters, Butler v. ....	147
Sylliaasen v. Hanson.....	608
Sylvester, Blangy v.....	699
 Tacoma, Vreeland v.....	625
Tacoma Eastern Railroad Company, Sturgeon v.....	366
Taylor v. Debritz.....	373
Tenino Stone Quarries, Withiam v.....	127
Tenny v. Seattle Electric Company.....	150
Tergeson v. Robinson Manufacturing Company.....	294
Thomas v. Seattle Brewing & Malting Company.....	560
Thompson, Merriman v.....	500
Thompson, State v.....	633
Tipton v. Roberts.....	391
Titlow, Hoffman v.....	80
Treat, Allen v.....	552
Trimble, Brown v.....	270
 Ulrich v. Stephens.....	199
Union Iron Works, Peterson v.....	505
 Van Horn v. Van Horn.....	388
Victor Safe & Lock Company v. O'Neil.....	176
Von Shultz, State v.....	698
Vreeland v. Tacoma.....	625
 Waight v. Lake Washington Mill Company.....	402
Walker, McMillan v.....	342
Walker, State v.....	8
Walla Walla, Dean v.....	75

# CASES REPORTED.

xv

	<i>Page</i>
Walters v. Seattle, Renton & Southern Railway Company	233
Waring v. Loomis.....	541
Warwick, Morris v.....	426
Weist, Peterson v.....	339
Welch v. Beacon Place Company.....	449
Wenatchee Canal Company, Lanham v.....	337
Western Dry Goods Company, Peyser v.....	55
Whatcom County v. Yellowkanim.....	90
Whitehouse v. Cowles.....	546
Wikstrom v. Preston Mill Company.....	164
Williams v. Hillman Investment Company.....	695
Wilson v. McMillan.....	378
Winnett, State v.....	93
Winningham, Donaldson v.....	374
Winyer, Meeker v.....	27
Wiseman, State v.....	697
Withiam v. Tenino Stone Quarries.....	127
Wright v. Lake.....	469
Yahey, State ex rel. Holcomb v.....	419
Yellowkanim, Whatcom County v.....	90



# TABLE OF CASES CITED BY THE COURT

		<i>Page</i>
Aberdeen v. Lucas.....	37 Wash. 190.....	347
Adamant Mfg. Co. v. Wallace....	16 Wash. 614.....	267
Alexander v. Tacoma.....	35 Wash. 366.....	347
Alley v. Bowen-Merrill Co.....	76 Ark. 4.....	418
Ambrose v. Moore.....	46 Wash. 463.....	669
Anderson v. Inland Tel. etc. Co....	19 Wash. 575.....	128
Anderson v. McGregor.....	36 Wash. 124.....	315
Anderson v. Whatcom County.....	15 Wash. 47.....	463
Andrew v. State.....	5 Iowa 389.....	135
Ankeny v. Clark.....	1 Wash. 549.....	305
Annie Wright Seminary v. Tacoma	23 Wash. 109.....	347
Armstrong v. Cosmopolis.....	32 Wash. 110.....	508
Armstrong v. Oakley.....	23 Wash. 122.....	612
Atkinson v. Washington Irr. Co....	44 Wash. 75.....	414
Atlantic & Pac. R. Co. v. Mingus..	165 U. S. 413.....	476
Atwood v. Atwood.....	15 Wash. 285.....	258
Austin v. Seattle.....	2 Wash. 667.....	77
Babcock Brothers Lumber Co. v.		
Johnson .....	120 Ga. 1030.....	368
Bancroft-Whitney Co. v. Gowan...	24 Wash. 66.....	35
Bailey v. Drake.....	12 Wash. 99.....	652
Bailey v. Mukilteo Lumber Co.....	44 Wash. 581.....	317
Baker v. Baker.....	136 Cal. 302.....	390
Baker v. Seattle.....	2 Wash. 576.....	76
Barclay v. Barclay.....	184 Ill. 375.....	389, 390
Bartee v. Edmunds.....	29 Ky. Law 872.....	654
Bartel v. Lope.....	6 Ore. 321.....	563
Baugh v. Baugh.....	4 Bibb. (Ky.) 556.....	389
Bender v. Bender.....	21 Wash. 633.....	550
Bingham v. Keylor.....	25 Wash. 156.....	550
Black River Imp. Co. v. La Crosse		
Booming & Transp. Co.....	54 Wis. 659.....	615
Blake v. Blake.....	80 Ill. 523.....	390
Blitz v. Toovey.....	9 N. Y. Supp. 439.....	112

		<i>Page</i>
Bloomington v. Well.....	29 Wash. 611.....	258
Board of Supervisors v. Hackett...	21 Wis. 620.....	466
Boggan v. Reid.....	1 Wash. 514.....	20
Borrow v. Borrow.....	34 Wash. 684.....	424
Bowers v. Ledgerwood.....	25 Wash. 14.....	434
Boyle v. Anderson & Middleton Lumber Co.....	46 Wash. 431.....	245
Bradley v. Fisher.....	13 Wall. 335.....	158, 161
Briggs v. Bounds.....	48 Wash. 579.....	679
Brockway v. Abbott.....	37 Wash. 263.....	36
Brooks v. Cedar Brook & S. C. R. Imp. Co.....	82 Me. 17.....	615
Brown v. Baldwin.....	46 Wash. 106.....	251
Brown Brothers & Co. v. Forest...	1 Wash. Ter. 202.....	189
Bullock v. Wallace.....	47 Wash. 690.....	116, 374
Burnham v. Royal Ins. Co.....	75 Mo. App. 394.....	54
Burrows v. Grays Harbor Boom Co.	44 Wash. 630...278, 280, 288,	618
Canady v. Knox.....	43 Wash. 567.....	685
Carlson Bros. & Co. v. Van De Vanter .....	19 Wash. 32.....	429
Carpenter v. Willey.....	65 Vt. 168.....	135
Carson v. Jansen.....	65 Neb. 423.....	456
Carson v. Thompson.....	10 Wash. 295.....	258
Carson v. Titlow.....	38 Wash. 196.....	172
Carstens v. McReavy.....	1 Wash. 359.....	2, 611
Cassady v. Old Colony St. R. Co...	184 Mass. 156.....	236
Chevallier & Co. v. Willson.....	30 Wash. 227.....	315, 445
Chicago City R. Co. v. Carroll....	206 Ill. 318.....	236
Chicago City R. Co. v. McMahon...	103 Ill. 485.....	222
Chicago etc. R. Co. v. Long.....	26 Tex. Civ. App. 601....	624
Christianson v. Pacific Bridge Co..	27 Wash. 582.....	129
Christofferson v. Pfennig.....	16 Wash. 491.....	376
Churchill v. Stephenson.....	14 Wash. 620.....	667
Clark v. Mosher.....	107 N. Y. 118.....	68
Cohn v. Wausau Boom Co.....	47 Wis. 314.....	615
Cole v. Satsop R. Co.....	9 Wash. 487.....	268
Coleman v. Pearce.....	26 Minn. 123.....	418
Coolidge v. Schering.....	32 Wash. 557.....	384
Cox v. Tompkinson.....	39 Wash. 70.....	669, 670
Craig v. Weitner.....	33 Neb. 484.....	112
Crook v. Hewitt.....	4 Wash. 749.....	616
Crow v. Northern Pac. R. Co.....	45 Wash. 605.....	129
Crozler v. People.....	1 Parker Crim. Rep. (N. Y.) 453.....	135
Cruikshank v. Gordon.....	118 N. Y. 178.....	135, 222
Curry v. Wilson.....	45 Wash. 19.....	377
Cutler v. Cutler.....	88 Ill. App. 464.....	389, 390

# CASES CITED.

xix

		Page
Dale v. Hanover Nat. Bank.....	155 Mass. 141.....	145
Daniel v. Glidden.....	38 Wash. 556.....	354
Davis v. Johnson.....	96 Minn. 130.....	573
Davis v. Phoenix Ins. Co.....	111 Cal. 409.....	65
Davis v. Pioneer Mut. Ins. Ass'n...	44 Wash. 532.....	52, 53, 54
Dawson v. McMillan.....	34 Wash. 269.....	615
Deering v. Holcomb.....	26 Wash. 588.....	341
Degginger v. Martin.....	48 Wash. 1.....	611
Dennis v. Strassburger.....	89 Cal. 583.....	313
Dickens' Case .....	67 Pa. St. 169.....	161
Dingley v. Oler.....	117 U. S. 490.....	183
Donahue v. Johnson.....	9 Wash. 187.....	193
Donohue v. Pomeroy.....	19 N. Y. Supp. 569.....	573
Dossett v. St. Paul & Tacoma Lum- ber Co.....	40 Wash. 276.....	624
Dowling v. Exchange Bank of Bos- ton .....	145 U. S. 512.....	418
Duggar v. Dempsey.....	13 Wash. 396.....	409, 447
Dunn v. Kemp & Herbert.....	36 Wash. 183.....	206
Dunn v. New York etc. R. Co.....	46 C. C. A. 546.....	368
East Hoquiam Boom & Logging Co. v. Neeson.....	20 Wash. 142.....	615
Edelstein v. Brown.....	95 S. W. (Tex. Civ. App.) 1126 .....	653
Edson v. Knox.....	8 Wash. 642.....	258
Eldner v. Three Lakes Lumber Co..	45 Wash. 323.....	624
Elderkin v. Peterson.....	8 Wash. 674.....	268, 269
Elliott v. Puget Sound etc. S. S. Co.	22 Wash. 220.....	522
Elma v. Carney.....	9 Wash. 466.....	232
Eno v. New York Elevated R. Co...	15 App. Div. 336.....	456
Erickson v. McNeeley Co.....	41 Wash. 509.....	245
Espy Estate Co. v. Pacific County..	40 Wash. 67.....	231
Ex parte Bradley.....	7 Wall. 364.....	161
Ex parte Epley.....	10 Okl. 631.....	456
Ex parte Secombe.....	19 How. 13.....	161
Falls Mfg. Co. v. Oconto River Imp. Co.....	87 Wis. 134.....	615
Farmers' Ins. Co. v. Frick.....	29 Ohio St. 466.....	54
Farnsworth v. Minnesota & Pac. R. Co. ....	92 U. S. 49.....	477
Faulkner v. Seattle.....	19 Wash. 320.....	76
Felger v. Robinson.....	3 Ore. 455.....	616
Ferry v. Tacoma.....	34 Wash. 652.....	347
Feurer v. Stewart.....	82 Fed. 294.....	26
Filley v. Murphy.....	30 Wash. 1.....	29
First Nat. Bank v. Parker.....	28 Wash. 234.....	447

			Page
Fisk v. Norvel.....	9 Tex.	13.....	145
Fitch v. Applegate.....	24 Wash.	25.....	679
Flanders v. Chamberlain.....	24 Mich.	306.....	563
Flatley v. Phoenix Ins. Co.....	95 Wis.	618.....	53
Flint v. Long.....	12 Wash.	342.....	434
Flood v. Pilgrim.....	32 Wis.	376.....	145
Fogg v. Hoquiam.....	23 Wash.	340.....	76
Forker v. Henry.....	21 Wash.	235.....	21
Foster, Neville & Co. v. Stallworth.	62 Ala.	547.....	341
Fox v. Nachtsheim.....	3 Wash.	684.....	67
Francoeur v. Newhouse.....	43 Fed.	236.....	434
French v. Ajax Oil & Development Co. ....	44 Wash.	305.....	517
Freund v. Freund.....	63 Atl. (N. J.)	756.....	389
Gaudie v. Northern Lumber Co....	34 Wash.	34.....	129
Geddis v. Parrish.....	1 Wash.	587.....	414
Gehres v. Orlowski.....	36 Wash.	156.....	550
Geisler v. Geisler.....	30 Ky. Law	430.....	389, 390
George v. Columbia etc. R. Co.....	38 Wash.	480.....	578
German-American Sav. Bank v. Spokane .....	17 Wash.	315.....	76
Goldthorpe v. Clark-Nickerson Lumber Co.....	31 Wash.	467.....	129
Goldthwait v. Lynch.....	9 Utah	186.....	559
Gragg v. Home Ins. Co.....	28 Ky. Law	988.....	53
Granger v. Harriman.....	89 Minn.	303.....	145
Graves v. United States.....	150 U. S.	118.....	222
Gray v. Granger.....	48 Wash.	442.....	672
Great Northern R. Co. v. Snoho- mish County .....	48 Wash.	478.....	700
Greer v. Mezes.....	24 How.	268.....	252
Griffin v. Warburton.....	23 Wash.	231.....	145
Griffith v. Strand.....	19 Wash.	686.....	353, 356
Grimmelman v. Union Pac. R. Co.....	101 Iowa	74.....	624
Griswold v. Haven.....	25 N. Y.	595.....	418
Grout v. Tacoma Eastern R. Co....	33 Wash.	524.....	129
Haley Grocery Co. v. Haley.....	8 Wash.	75.....	687
Hammel v. Fidelity Mutual Aid Ass'n .....	42 Wash.	448.....	148
Hangover Fire Ins. Co. v. Johnson..	26 Ind. App.	122.....	54
Hansen v. Seattle Lumber Co....	31 Wash.	604.....	508
Hartford Fire Ins. Co. v. Redding.	47 Fla.	228.....	53
Hatch v. Tacoma, O. etc. R. Co.....	6 Wash.	1.....	282
Hathaway v. McDonald.....	27 Wash.	659.....	45
Hathaway v. Yakima Water & Light Co. ....	14 Wash.	469.....	414

# CASES CITED.

xxi

			Page
Havens v. Germania Fire Ins. Co.	123 Mo.	403	64
Heinzerling v. Agen	46 Wash.	390	335
Heirn v. M'Caughan	32 Miss.	17	418
Helm v. Johnson	40 Wash.	420	578
Hesser v. Slepman	35 Wash.	14	434
Hill v. Boston	122 Mass.	344	87
Hindman v. Boyd	42 Wash.	17	152
Hiscock v. Grays Harbor Boom Co.	44 Wash.	699	278
Hite v. Hite	124 Cal.	389	390
Hoffman v. American Foundry Co.	18 Wash.	287	623
Holmes v. Southern Pac. R. Co.	120 Cal.	357	370
Honselman v. People	168 Ill.	172	698
Horr v. Hollis	20 Wash.	424	3
Horrell v. California etc. Assn.	40 Wash.	531	67
Houser v. Austin	2 Idaho	204	222
Hovey v. Pitche	13 Mo.	191	112
Howells v. North American Transp. & Trad. Co.	24 Wash.	689	240
Hughes v. Momenoe	163 Ill.	535	627
Hulet v. Achey	39 Wash.	91	356
Humphries v. Sorenson	33 Wash.	563	578
Hunt v. Monroe	91 Pac. (Utah)	269	389
Illinois Cent. R. Co. v. Chicago etc. R. Co.	26 Fed.	477	535
In re Austin	5 Rawles (Pa. St.)	206	162
— Boone	83 Fed.	944	158
— Dougherty's Estate	34 Mont.	336	145
— Lambuth	18 Wash.	478	157, 158, 162
— McLaughlin's Estate	4 Wash.	570	654
— Philbrook	105 Cal.	471	159, 161
— Smith	73 Kan.	743	158
— Snow	27 Utah	265	159
— Sullivan's Estate	36 Wash.	217	144
— Sullivan's Estate	48 Wash.	639	643
— Thompson	36 Wash.	377	9, 293, 684
— Waugh	32 Wash.	50	158, 162, 163
— Westlake Avenue	40 Wash.	144	604
— Wilson	32 Minn.	145	152
— Woolley	74 Ky.	95	159
Israel v. Israel	148 Fed.	576	389
Jacobsen v. Lunn	16 Wash.	487	315
Jacobson v. Aberdeen Packing Co.	26 Wash.	175	409
Jamieson & McFarland v. Helm	43 Wash.	153	589
Janesville v. Janesville Water Co.	89 Wis.	159	456
Jespersion v. Mech.	213 Ill.	488	145
Johnson v. Spear	76 Mich.	139	244

			<i>Page</i>
Johnson v. Tacoma Mill Co.....	22 Wash.	88.....	317
Johnston v. Wood.....	19 Wash.	441.....	45
Jose v. Stetson.....	20 Wash.	648.....	189
Kamm v. Normand.....	91 Pac. (Ore.)	448.....	618
Keesler v. State.....	154 Ind.	242.....	222
Keith v. Smith.....	46 Wash.	131.....	580, 678
Kelly v. People.....	192 Ill.	119.....	698
Kenyon v. Spokane.....	17 Wash.	57.....	76
Kilgore v. Northwest Texas Baptist Ed. Ass'n .....	90 Tex.	139.....	183
Kimball v. School District No. 122.	23 Wash.	520.....	488
Kincaid v. McGowan.....	88 Ky.	91.....	252
King v. Phoenix Ins. Co.....	195 Mo.	290.....	64
King v. Southerton.....	6 East.	125.....	107, 108
Kinney v. Kickox.....	24 Neb.	167.....	63
Kirby v. Wheeler Osgood Co.....	42 Wash.	610.....	298
Kirtley v. Spokane County.....	20 Wash.	111.....	89
Kortright v. Cady.....	21 N. Y.	343.....	563
Krickeberg v. St. Paul & Tacoma Lumber Co. ....	37 Wash.	63.....	623
Krutz v. Isaacs.....	25 Wash.	566.....	251, 376
Lawson v. Vernon.....	38 Wash.	422.....	355
Leavenworth v. Billings.....	26 Wash.	1.....	652
Ledyard v. Brown.....	39 Tex.	402.....	389
Leftwich v. Royal Ins. Co.....	91 Md.	596.....	54
Leonard v. Woodruff.....	23 Utah	494.....	559
Lochnane v. Lochnane.....	78 Ky.	467.....	390
Longmire v. Smith.....	26 Wash.	439.....	491
Loos v. Rondema.....	10 Wash.	164.....	674
Loughborough v. McNevin.....	74 Cal.	250.....	563
Loving v. McPhail.....	48 Wash.	113.....	374
Lownsdale v. Grays Harbor Boom Co. ....	36 Wash.	198.....	615
Lownsdale v. Grays Harbor Boom Co. ....	44 Wash.	699.....	278
Lyman v. Hampshire.....	140 Mass.	311.....	87, 90
Lynde v. Lynde.....	162 N. Y.	405.....	389
Lynde v. Lynde.....	181 U. S.	183.....	389
McCalla v. Multnomah County.....	3 Ore.	424.....	90
McFarland v. Fairlamb.....	18 Wash.	601.....	274
McMaster v. Advance Thresher Co.	10 Wash.	147.....	45, 148
McNamee v. Tacoma.....	24 Wash.	591.....	232, 347
Mann v. Young.....	1 Wash. Ter.	454.....	341
Martin v. Webb.....	110 U. S.	7.....	333
Matchett v. Cincinnati etc. R. Co.	132 Ind.	334.....	370

# CASES CITED.

xxiii

			Page
Mather v. Walsh.....	107	Mo. 121.....	434
Matthews v. Belfast Mfg. Co.....	35	Wash. 662.....	617, 618
May v. Ivie.....	68	Tex. 381.....	559
May v. Sutherlin.....	41	Wash. 609.....	344
Meincke v. Falk.....	61	Wis. 623.....	112
Meyer v. Tacoma L. & P. Co.....	8	Wash. 144.....	414
Miles Co. v. Gordon.....	8	Wash. 442.....	675
Miller v. Philips & Co.....	44	Wash. 226.....	83, 557
Missouri Pac. R. Co. v. Western			
Assur. Co. ....	129	Fed. 610.....	54
Mitchell v. Matheson.....	23	Wash. 723.....	268
Mitchell v. Roberts.....	17	Fed. 776.....	563
Monfort v. McDonough.....	20	Wash. 710.....	3
Monroe Mill Co. v. Menzel.....	45	Wash. 487.....	616, 618
Moore v. Brownfield.....	7	Wash. 23.....	434
Moore v. Kirkman.....	19	Wash. 605.....	276
Moore v. Norman.....	43	Minn. 428.....	563
Morrison v. Snow.....	26	Utah 247.....	159
Moynahan v. Moore.....	9	Mich. 8.....	563
Mulholland v. Washington Match			
Co. ....	35	Wash. 315.....	353
Murphy v. Murphy.....	42	Wash. 142.....	145
Naylor v. Metropolitan St. R. Co...	66	Kan. 407.....	119
Nelson v. Willey Steamship & Nav.			
Co. ....	26	Wash. 548.....	624
Newark Sav. Inst. v. Jones.....	37	N. J. Eq. 449.....	559
New Whatcom v. Bellingham Bay			
Imp. Co. ....	9	Wash. 639.....	232
New Whatcom v. Fairhaven Land			
Co. ....	24	Wash. 493.....	282, 616
Nichols v. Oppermann.....	6	Wash. 618.....	667
Noren v. Larson Lumber Co.....	46	Wash. 241.....	245
Norris v. Tripp.....	111	Iowa 115.....	456
North British etc. Ins. Co. v. Ed-			
mundson .....	104	Va. 486.....	53
North Chicago St. R. Co. v. Cotton.	140	Ill. 486.....	236
Northern Assur. Co. v. Hanna.....	60	Neb. 29.....	53
Northern Pac. R. Co. v. Miller.....	20	Wash. 21.....	478
Northern Pac. R. Co. v. St. Paul			
etc. R. Co.....	1	McCrary 302.....	535
Northern Pac. R. Co. v. Seattle....	46	Wash. 674.....	604
Northern Pac. R. Co. v. Smith....	171	U. S. 261.....	533
Northern Pac. R. Co. v. Townsend.	190	U. S. 267.....	533
Northwestern etc. Bank v. Ridpath	29	Wash. 687.....	376
Northwestern Lumber Co. v. Cal-			
lendar .....	36	Wash. 492.....	355

			<i>Page</i>
Norwood v. Baker.....	172 U. S.	269.....	232
Novelty Iron Works v. Capital City			
Oatmeal Co. ....	88 Iowa	524.....	112
Nyback v. Champagne Lumber Co..	109 Fed.	732.....	243
O'Brien v. Page Lumber Co.....	39 Wash.	537.....	624
O'Connor v. Slatter.....	46 Wash.	308.....	494, 653
Olson v. McMurray Cedar Lum. Co.	9 Wash.	500.....	623
Offield v. Ish.....	21 Wash.	277.....	491
Oshkosh Gas-Light Co. v. Germania			
Fire Ins. Co.....	71 Wis.	454.....	64
Owen v. Owen.....	41 Wash.	642.....	214
Pahlman v. Taylor.....	75 Ill.	629.....	418
Palmer v. Danville.....	154 Ill.	156.....	627
Parsons v. Tacoma Smelting & Re-			
fining Co. ....	25 Wash.	492.....	169
Patton v. Texas & Pac. R. Co.....	179 U. S.	658.....	507
Pearson v. Federal Min. etc. Co....	42 Wash.	90.....	623
Peirce v. Wheeler.....	44 Wash.	326.....	3, 612
People v. Chin Hane.....	108 Cal.	597.....	222
— v. Green.....	9 Colo.	506.....	158, 159
— v. Supervisors.....	25 Hun.	131.....	152
People ex rel. Nechamcus v. War-			
den .....	144 N. Y.	529.....	11
People ex rel. Skelton v. Brown...	17 Colo.	431.....	159
Peterson v. Hicks.....	43 Wash.	412.....	424
Peterson v. Seattle Traction Co....	23 Wash.	615.....	499
Peterson v. Union Iron Works....	48 Wash.	505.....	663
Petros v. Vancouver.....	13 Wash.	423.....	77
Phillips v. Port Townsend Lodge..	8 Wash.	529.....	392
Phinizy v. Guernsey.....	111 Ga.	346.....	63
Phoenix Ins. Co. v. Kerr.....	129 Fed.	725.....	63
Pierce v. Willson.....	48 Ind.	398.....	572
Pitchers v. Lone Pine-Surprise Min.			
Co. ....	39 Wash.	608.....	169
Plummer v. Well.....	15 Wash.	427.....	574
Portland & Seattle R. Co. v. Ladd..	47 Wash.	88.....	510
Potter v. Potter.....	45 Wash.	401.....	655
Potter v. Whatcom.....	25 Wash.	207.....	347
Povah v. Lee.....	29 Wash.	108.....	251
Prante v. Lompe.....	74 Neb.	210.....	456
Price v. Scott.....	13 Wash.	574.....	425
Prindle v. State.....	31 Tex. Cr.	551.....	698
Prosser v. Montana Cent. R. Co....	17 Mont.	372.....	369
Puget Sound Iron Co. v. Worthing-			
ton .....	2 Wash. Ter.	472.....	499

# CASES CITED.

xiv

			Page
Queen v. Woodward.....	11 Mod.	137.....	107, 108
Queen Ins. Co. v. Jefferson Ice Co.....	64 Tex.	578.....	64
Quinlan v. Providence etc. Ins. Co.....	133 N. Y.	356.....	54
Randall v. Kingsland.....	53 How. Pr.	512.....	572
Ranous v. Seattle Elec. Co.....	47 Wash.	544.....	395, 396
Reidhead v. Skagit County.....	33 Wash.	174.....	508
Reynolds v. Dickson.....	48 Wash.	407.....	447
Rattelmiller v. Stone.....	28 Wash.	104.....	334, 341
Rector v. Bryant Lumber etc. Co.....	41 Wash.	556.....	244
Reichenbach v. Washington Short Line R. Co.....	10 Wash.	357.....	251
Rice v. Commonwealth.....	102 Pa. St.	408.....	222
Ridpath v. Spokane Stamp Works.....	48 Wash.	320.....	371
Robinson v. Haller.....	8 Wash.	309.....	428
Rowland v. Eskeland.....	40 Wash.	253.....	172
Russell v. Men of Devon.....	2 Term. R.	667.....	89
St. Paul Fire etc. Ins. Co. v. Owens.....	69 Kan.	602.....	53
Samson v. Beale.....	27 Wash.	557.....	353
Scammon v. Germania Ins. Co.....	101 Ill.	621.....	54
Schooler v. Asherst.....	1 Littell (Ky.)	216.....	255
Schott Co. v. Stone, Fisher & Lane.....	35 Wash.	252.....	183
Schulenberg v. Harriman.....	21 Wall.	44.....	475, 477
Schwede v. Hemrich Bros. Brewing Co. ....	29 Wash.	21.....	152
Seaman v. Ascherman.....	57 Wis.	547.....	418
Seattle v. Barto.....	31 Wash.	141.....	45
Seattle v. Seattle Electric Co.....	48 Wash.	599.....	700
Seattle & Montana R. Co. v. Belling- ham Bay & Eastern R. Co.....	29 Wash.	491.....	534, 535
Seattle Transfer Co. v. Seattle.....	27 Wash.	520.....	282
Shank v. Wilson.....	33 Wash.	612.....	655
Shaprio v. Western Home Ins. Co.....	51 Minn.	239.....	54
Sharon v. Sharon.....	67 Cal.	185.....	390
Sharon R. Co. v. Sharpsville R. Co.....	122 Pa. St.	533.....	538
Sherlock v. Denny.....	28 Wash.	170.....	667
Sherman v. Sweeny.....	29 Wash.	321.....	353
Shippen v. Bowen.....	122 U. S.	575.....	400
Sistare v. Sistare.....	66 Atl. (Conn.)	772.....	389
Slaght v. Northern Pac. R. Co.....	39 Wash.	576.....	414
Slaughter's Adm'r v. Gerson.....	13 Wall.	379.....	352, 353, 357
Smith v. Seattle.....	25 Wash.	300.....	627, 630
Smoot's Case .....	15 Wall.	36.....	183
Soder v. Adams Hardware Co.....	38 Wash.	607.....	315
Southern Pac. R. Co. v. Dufour.....	95 Cal.	615.....	414
Southern R. Co. v. Harrison.....	119 Ala.	539.....	441
Spithill v. Jones.....	3 Wash.	290.....	251

			<i>Page</i>
Spokane County v. Allen.....	9 Wash.	229.....	467
Spokane Falls etc. R. Co. v. Abitz..	38 Wash.	8.....	172
Spring Valley Water Works v.			
Bryant .....	52 Cal.	132.....	152
State v. Ames .....	47 Wash.	328.....	72
— v. Anderson .....	20 Wash.	193.....	315
— v. Barr .....	11 Wash.	481.....120, 121, 122	
— v. Brown .....	37 Wash.	106.....	684
— v. Carey .....	4 Wash.	424.....	9
— v. Carter .....	8 Wash.	272.....	96
— v. Clark .....	43 Wash.	664.....	71
— v. Fetterly .....	33 Wash.	599.....	135
— v. Forsythe .....	99 Iowa	1.....	135
— v. Fremont etc. R. Co.....	22 Neb.	313.....	485
— v. Hogan .....	67 Conn.	581.....	222
— v. Holedger .....	15 Wash.	443.....	96
— v. Horlacher .....	16 Wash.	325.....	513
— v. Keith .....	48 Wash.	77.....	697
— v. Markins .....	95 Ind.	464.....	135
— v. Mayo .....	42 Wash.	540.....190, 191	
— v. Merchant .....	48 Wash.	69.....	463
— v. Moore .....	31 Conn.	479.....120, 122	
— v. Mosher .....	128 Iowa	82.....	158
— v. Parker .....	25 Wash.	405.....	96
— v. Robinson .....	12 Wash.	349.....	261
— v. Roller .....	30 Wash.	692.....135, 222	
— v. Rozum .....	8 N. D.	548.....	222
— v. Seaton .....	26 Wash.	305.....	674
— v. Sexton .....	37 Wash.	110.....	684
— v. Sharpless .....	31 Wash.	191.....8, 9, 45	
— v. Vance .....	29 Wash.	435.....	445
— v. Wood .....	33 Wash.	290.....	135
State ex rel. Amalgamated Republic			
Mines Co. v. Nichols....	47 Wash.	117.....607, 608	
— Attorney General v.			
McGraw .....	13 Wash.	311.....	76
— Barnard v. Board of Edu-			
cation .....	19 Wash.	8.....	455
— Burrows v. Superior Court	43 Wash.	225.....	455
— Burrows v. Superior Court	48 Wash.	277.....	287
— Burrows v. Superior Court	48 Wash.	286.....	618
— Byers v. Superior Court...	28 Wash.	403.....	455
— Columbia Valley R. Co. v.			
Superior Court .....	45 Wash.	316.....	534
— Commercial Elec. L. & P.			
Co. v. Stallcup.....	15 Wash.	263.....	455
— Davis v. Clausen.....	47 Wash.	372.....467, 468	

# CASES CITED.

xxvii

Page

State ex rel. Denham v. Superior Court .....	28	Wash. 590.....	421
— German-Am. etc. Sav. Bank v. Sup'r Ct.....	12	Wash. 677.....	421
— Gibson v. Superior Court..	39	Wash. 115.....	455
— Johnson v. Gebhardt.....	87	Mo. App. 542.....	158
— Kent Lumber Co. v. Superior Court .....	46	Wash. 516.....	534
— Latimer v. Henry.....	28	Wash. 38.....	232
— Lowary v. Superior Court. 41	Wash. 450.....		377
— Miller v. Superior Court..	40	Wash. 555.....	672
— Oregon & Washington R. Co. v. Abraham.....	48	Wash. 215.....	699
— Pagett v. Superior Court..	46	Wash. 35.....	92
— Portland & Seattle R. Co. v. Superior Court.....	45	Wash. 270.....	538
— Richey v. Smith.....	42	Wash. 237.....	9, 11, 15
— Ross v. Clausen.....	47	Wash. 607.....	467
— Seattle v. Carson.....	6	Wash. 250.....	467
— Seattle Elec. Co. v. Superior Court .....	28	Wash. 317.....	92
— Skamania Boom Co. v. Superior Court .....	47	Wash. 166.....	285, 535, 538
— Smith v. Board of Dental Examiners .....	31	Wash. 492.....	9, 684
— Smith v. Superior Court..	26	Wash. 278.....	282
— Smith v. Superior Court..	30	Wash. 219.....	282
— Smith v. Superior Court..	47	Wash. 508.....	672
— Spokane Falls & N. R. Co. v. Superior Court.....	40	Wash. 389.....	534
— Thomas v. Superior Court. 42	Wash. 521.....		517
— Thurston County v. Grimes	7	Wash. 445.....	466
— Wilson v. Superior Court. 47	Wash. 397 .....		285
Stearns v. Hochbrunn.....	24	Wash. 206.....	502
Steele v. German Ins. Co.....	93	Mich. 81.....	53
Stein v. Waddell.....	37	Wash. 634.....	313
Stemmler v. McNeill.....	102	Fed. 660.....	253
Stratton v. Nichols Lumber Co....	39	Wash. 323.....	508
Strong v. Iowa Central R. Co.....	94	Iowa 380.....	370
Sturr v. Beck.....	133	U. S. 541.....	492
Summerville v. Summerville.....	31	Wash. 411.....	655
Tabbutt v. American Ins. Co.....	185	Mass. 419.....	65
Taylor v. Modern Woodmen of America .....	42	Wash. 304.....	315
Tergeson v. Robinson Mfg. Co.....	43	Wash. 298.....	295
Terry v. Furth.....	40	Wash. 493.....	255
Teutonia Ins. Co. v. Johnson.....	72	Ark. 484.....	51

	<i>Page</i>
Texas & Pac. R. Co. v. Abilene Cotton Oil Co.....	204 U. S. 426..... 441
Texas & Pac. R. Co. v. Mugg.....	202 U. S. 242..... 441
Theis v. Spokane Falls Gas Light Co. ....	34 Wash. 23..... 169
Thompson v. Hawley.....	14 Ore. 199..... 559
Titlow v. Cascade Oatmeal Co.....	16 Wash. 616..... 22
Todd v. Jackson.....	75 Ind. 272..... 418
Towner v. Rodegeb.....	33 Wash. 153..... 259
Trumbull v. Jackman.....	9 Wash. 524..... 499
Trumbull v. Jefferson Co.....	37 Wash. 604..... 67
Union Pac. R. Co. v. Burlington etc. R. Co.....	1 McCrary 452..... 535
Union Pac. R. Co. v. Leavenworth etc. R. Co.....	29 Fed. 728..... 535
United States v. Gilliam....	Fed. Cas. No. 15,205a....121, 122
United States v. Northern Pac. R. Co. ....	177 U. S. 435..... 476
United States v. Repentigny.....	5 Wall. 211.....476, 477
Van Siclen v. Muir.....	44 Wash. 361..... 578
Vantongerren v. Heffernan.....	5 Dak. 180..... 484
Vine v. Vine.....	21 R. I. 190..... 389
Vittum v. Estey.....	67 Vt. 158..... 183
Waite v. Wingate.....	4 Wash. 324.....445, 446
Wallace v. Seaboard Air Line R. Co.....	141 N. C. 646..... 363
Walsh v. Bushell.....	26 Wash. 576..... 353
Walters v. Seattle, Renton etc. R. Co. ....	48 Wash. 233..... 240
Waring v. Loomis.....	35 Wash. 85..... 544
Washington Bridge Co. v. Land & River Imp. Co.....	12 Wash. 272..... 112
Washington Cent. Imp. Co. v. Newlands .....	11 Wash. 212..... 352
Washington Nat. Bldg. etc. Ass'n v. Saunders .....	24 Wash. 321.....445, 672
Waterhouse v. Rock Island Alaska Min. Co. ....	97 Fed. 466.....135, 222
Watkins v. Dorris.....	24 Wash. 636..... 615
Webb v. Buckelew.....	82 N. Y. 555..... 389
Weber v. Laidler.....	26 Wash. 144..... 20
Weeks v. Baker.....	152 Mass. 20..... 563
Weir v. Seattle Elec. Co.....	41 Wash. 657..... 395
Welse v. Smith.....	3 Ore. 445..... 616
Western American Co. v. St. Ann Co. ....	22 Wash. 158.....91, 92, 93

# CASES CITED.

xxix

Page

West Seattle Land & Imp. Co. v.			
Herren .....	16	Wash. 665.....	353
Wheeler, Osgood & Co. v. Ralph...	4	Wash. 617.....	425
Wheelock v. Jacobs.....	70	Vt. 162.....	414
White v. Codd.....	39	Wash. 14.....	617
White v. Home Mut. Ins. Co.....	128	Cal. 131.....	54
White Pine Lumber Co. v. Aetna			
Indemnity Co. ....	42	Wash. 569.....	193
Whittaker v. Venice.....	150	Ill. 195.....	152
Whitworth v. McKee.....	32	Wash. 83.....	377
Wickman v. Sprague.....	18	Wash. 466.....	341
Willey v. Willey.....	22	Wash. 115.....	654
Williams v. Ninemire.....	23	Wash. 393.....	499
Winston v. Spokane.....	12	Wash. 524.....	76
Wood v. Roxborough etc. Pass. N.			
Co. ....	12	Montg. Co. Rep. (Pa.)	
		155 .....	236
Wright v. Smith.....	19	Nev. 143.....	145
Young v. Tacoma.....	31	Wash. 153.....	347
Ziebell v. Eclipse Lumber Co.....	33	Wash. 591.....	244



## CITED AND CONSTRUED

CONSTITUTION OF WASHINGTON.		BALLINGER'S CODE—Continued.	
	Page		Page
Art. 1, § 16.....	454, 618	Section 5254 .....	504
“ 2, § 19.....	44, 71	“ 5356 .....	428
“ 2, § 25.....	465	“ 5376 .....	26
“ 4, § 4.....	67	“ 5403 .....	131
“ 7, § 2.....	482	“ 5439 .....	428
“ 8, § 6.....	76	“ 5504 .....	450
“ 11, § 8.....	464	“ 5505 .....	450, 579
“ 11, § 10.....	630	“ 5506 .....	450
BALLINGER'S CODE.		“ 5549 .....	343
Section 490, 491.....	463	“ 5637 .....	281
“ 796 .....	602	“ 5638 .....	518
“ 1522 .....	428	“ 5673, 5674.....	88
“ 1563-1594 .....	462	“ 5780, 5789, 5790....	198
“ 1564, 1594.....	465	“ 5870 .....	562
“ 1699, 1749.....	172	“ 5904 .....	271
“ 2322, 2416.....	487	“ 5991 .....	653
“ 3032 .....	684	“ 6157 .....	428
“ 4262 .....	268	“ 6196, 6199a.....	275
“ 4291 .....	606	“ 6235 .....	274
“ 4379 .....	284	“ 6404 .....	428
“ 4387 .....	287	“ 6503 .....	420
“ 4388 .....	289, 618	“ 6506 .....	23, 421
“ 4388, 4389.....	287	“ 6512 .....	428
“ 4390 .....	287-289	“ 6513 .....	7
“ 4391-4394 .....	287	“ 6523 .....	23
“ 4490, 4517.....	667	“ 6535 .....	240
“ 4576 .....	580	“ 6774 .....	107
“ 4578 .....	361	“ 6782 .....	262
“ 4620, subd. 5.....	638	“ 6840 .....	263
“ 4765 .....	158	“ 6949 .....	75
“ 4843 .....	67	“ 7042 .....	262
“ 4854 .....	148	“ 7058 .....	220
“ 4912, 4913.....	446	“ 7086 .....	106
“ 4953 .....	430	“ 7226 .....	698
“ 5062 .....	674	“ 7230 .....	78, 79
“ 5064 .....	299	“ 7231, 7238.....	78, 697
“ 5153 .....	430	3 BALLINGER'S CODE.	
“ 5186 .....	427	Section 3025 .....	292



# STATUTES CITED AND CONSTRUED.

xxxiii

## SESSION LAWS—Continued.

	<i>Page</i>
1905, p. 110.....	679
p. 110, ch. 58.....	580
p. 224, §2.....	483
p. 300 .....	44
1907, p. 132.....	485
p. 351, §5.....	462, 463
p. 396 .....	133
p. 508 .....	485

## CHARTERS.

	<i>Page</i>
Tacoma Revised, §52, subd.	
2, 10, 13.....	628
art. 12, §§135-168.....	629
art. 13, §§169-178.....	629

## ORDINANCES.

Seattle, No. 14,116, §§2, 3, 5..	46-7
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CASES  
DETERMINED IN THE  
SUPREME COURT  
OF  
WASHINGTON

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[No. 6960. Decided December 8, 1907.]

FANNIE G. DEGGINGER, *Appellant*, v. J. M. MARTIN,  
*Respondent*.<sup>1</sup>

**FRAUDS, STATUTE OF—CONTRACT TO SELL LAND—ORAL AUTHORITY—EVIDENCE.** Proof of oral authority to a real estate broker to make a binding contract of sale, within the requirements of the statute of frauds, is sufficiently clear and convincing, within the rule which requires such degree of proof, when liberally construed on motion for a nonsuit, where the broker testified that the owner had listed the property with him, and on departing for a short absence, instructed him "to sell quick, take the money and close the deal" before the owner's return, if he could do so.

**SPECIFIC PERFORMANCE—TENDER—SUFFICIENCY.** Where a broker is authorized to make a contract of sale, a tender of the price to the agent is sufficient, when the owner is absent from the state, to entitle the purchaser to specific performance.

**SAME—NECESSITY.** Where the owner repudiates a sale made by an agent, tender of the price is not a condition precedent to an action for specific performance.

**FRAUDS, STATUTE OF—CONTRACT—SIGNING.** A broker's contract for the sale of lands is sufficiently signed where the firm name under which the broker did business was typewritten, and he signed his initials below.

**TRIAL—BEFORE THE COURT—ADMISSION OF EVIDENCE.** Upon the trial of a cause before a court without a jury, testimony offered should be liberally received, to avoid the necessity of a reversal in case of a trial *de novo* on appeal.

<sup>1</sup>Reported in 92 Pac. 674.

Appeal from a judgment of the superior court for King county, Yakey, J., entered May 24, 1907, upon granting a nonsuit, dismissing an action for specific performance of a contract to convey real estate. Reversed.

*Gray & Stern (Ralph Simon, of counsel), for appellant.*

*Byers & Byers, for respondent.*

CROW, J.—This action was commenced by Fanny G. Degginger, a single woman, against J. M. Martin, a widow, to enforce specific performance of a contract to convey real estate. Upon defendant's motion, the trial court granted a nonsuit and dismissed the action. The plaintiff has appealed.

The appellant alleged that one Charles E. Marvin, a real estate broker, was the respondent's agent, with authority to procure a purchaser and execute a contract of sale at a stated price and on specified terms; that on September 11, 1906, the agent, Charles E. Marvin, sold to appellant; that in pursuance of his authority, he executed and delivered to her a written contract of sale, and that the respondent has refused to convey. The contract is sufficiently definite to sustain a decree for specific performance, provided the alleged agent was authorized to execute the same. The controlling question on this appeal is whether he had such authority. There is no contention that he was so authorized in writing, but the appellant insists that he had lawful oral authority.

The trial court failed to state the grounds upon which the nonsuit was granted, but we infer from the entire record that he concluded Marvin's only power was that of the ordinary real estate broker to find a purchaser, which, under the doctrine announced in *Carstens v. McReavy*, 1 Wash. 359, 25 Pac. 471, would not authorize him to execute a contract of sale sufficient in equity to subject his principal to a decree for specific performance. While it is decided in *Carstens v. McReavy* that mere authority in an agent or broker to find a purchaser does

Dec. 1907]

Opinion Per Crow, J.

not imply power to execute a written contract of sale on behalf of the principal, nevertheless this court in that case said:

"The statute of frauds may be satisfied by the execution of a contract for the sale of lands by the hand of another person than the party to be charged, if that person be thereunto lawfully authorized, and it is well settled that such third person may be thus lawfully authorized, orally, by written direction not under seal, and, even, by a course of conduct amounting to an estoppel."

This same doctrine has since been announced in *Horr v. Hollis*, 20 Wash. 424, 55 Pac. 565; *Monfort v. McDonough*, 20 Wash. 710, 54 Pac. 1121, and *Peirce v. Wheeler*, 44 Wash. 326, 87 Pac. 361.

Although we have thus held that, under the statute of frauds, an enforceable contract for the sale of real estate may be signed either by the party to be charged or by some other person by him thereunto duly authorized, and that the authority of such other person may be in parol, we are of the opinion that such oral authority should in all cases be sustained by clear and convincing proof, and the manifest preponderance of the evidence, especially where the alleged authority is denied by the vendor or party to be charged. A less strict requirement might tend to promote the particular frauds which the statute was intended to prevent. The evidence of oral authority in this case was the testimony of the alleged agent Marvin, who stated that he represented the respondent in the purchase of the property; that she had bought it upon his advice, as an investment, and because he had in writing guaranteed her that he would sell it within a limited period at a profit of \$500 per lot; that he had possession of respondent's abstracts and title papers which she had left him; that she listed the property with him for sale; that she was about to leave the state of Washington when he told her he had a customer who had looked at the lots and to whom he thought he could sell at the desired profit; that she told him she might be gone some two weeks, but directed him "to sell quick, take the money and close

the deal" if he could do so during her absence; that she would leave her address and forward the papers; that within a few days after her departure, he did find a purchaser in the person of the appellant, at a price securing the profit named; that in pursuance of such oral authority, he took a substantial cash deposit, made the sale, and closed the deal by executing the written contract.

It would seem that an agent in the absence of his principal could not make a quick sale, receive the purchase money, and close a deal, if not authorized to make a valid contract. On an application for a nonsuit, the evidence should be weighed and considered most favorably to the party on whose behalf it has been offered. Applying this test to the evidence before us, we hold that the trial court erred in granting the nonsuit and in dismissing the action.

The respondent contends that no sufficient tender of performance by the appellant has been shown. At the time the appellant was required to pay the purchase money and was entitled to demand a deed, the respondent was absent from the state of Washington. The appellant made the tender and demanded the deed at the office of the agent Marvin. A party is not required to go beyond the limits of the state to make a tender. If the agent Marvin was authorized to execute the written contract, a tender to him was sufficient. If he was not so authorized, no tender whatever would have been of any avail to the appellant. In any event, the respondent at all times refused to recognize or ratify the contract, and is therefore in no position to complain of the want of a tender which she would have refused.

The respondent further contends that the contract was not signed by the agent Marvin, as the firm name under which he did business was typewritten and followed by his written initials. The evidence shows that the written initials were made by the agent, and that the contract was sufficiently executed by him if authorized.

Dec. 1907]

Syllabus.

The appellant has contended that the trial court erred in refusing to admit certain evidence offered by her. We find no prejudicial error in this regard, but in view of a new trial, we will suggest that, while the court in an action tried without a jury should reject all evidence clearly incompetent and immaterial, to avoid encumbering the record, yet a liberal practice should be adopted in admitting evidence so that this court, in the event of an appeal, will on a trial *de novo* have all material facts before it for consideration, and thus avoid the necessity of the cause being remanded for the admission of material evidence erroneously rejected.

For error in granting a nonsuit, the judgment is reversed, and the cause remanded for a new trial.

HADLEY, C. J., MOUNT, DUNBAR, and ROOT, JJ., concur.

FULLERTON and RUDKIN, JJ., took no part.

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[No. 6777. Decided December 6, 1907.]

NELLIE KELSO *et al.*, Respondents, v. AMERICAN INVESTMENT  
& IMPROVEMENT COMPANY, Appellant.<sup>1</sup>

APPEAL—DISMISSAL—MOTION—STATEMENT IN BRIEFS. Where a motion to dismiss an appeal was filed before briefs were served, calling attention thereto in the briefs, in a conspicuous place, is sufficient notice that the motion will be urged at the hearing, without setting the same out in the brief.

SAME—CESSATION OF CONTROVERSY—AFFIDAVITS—SUPPLEMENTAL RECORD. A motion to dismiss an appeal because of the cessation of the controversy may be supported by affidavits containing copies of parts of the record below, which need not be brought up by supplemental record, where the affidavit is undenied.

SAME—TEMPORARY RECEIVERSHIP. An appeal from an order appointing a temporary receiver will be dismissed because of the cessation of the controversy, where it is shown that, pending the appeal, the case had been tried on its merits and the temporary receivership superseded by a permanent receivership.

<sup>1</sup>Reported in 92 Pac. 673.

Appeal from an order of the superior court for King county, Albertson, J., entered January 19, 1907, appointing a temporary receiver, after a hearing before the court without a jury. Appeal dismissed.

*Hammond & Hammond and Blaine, Tucker & Hyland, for appellant.*

*Roberts & Hulbert, for respondents.*

HADLEY, C. J.—This appeal is from an order appointing a temporary receiver. The appeal is prosecuted by the American Investment & Improvement Company, a corporation, for whom the temporary receiver was appointed. The respondents have moved to dismiss the appeal on the ground that the controversy involved in the appeal has ceased. The facts upon which the motion is based are that, since the appeal was taken, the trial court has tried the cause upon its merits, and has entered final judgment whereby the temporary receivership was discontinued and was superseded by a permanent receivership.

The appellant has moved to strike the above-mentioned motion of respondents, together with the affidavit and exhibits thereto attached. The first ground urged for striking is that the motion is not set out in respondents' brief. The motion, affidavit, and exhibits were duly served on the 31st day of July, 1907, and were filed in this court August 2, 1907. It is true they were on separate paper and under separate file from the brief, but in the brief of respondents afterwards filed, attention is called, under a conspicuous heading, to the motion, with a statement of reasons in support of it. This was sufficient notice that the motion would be urged at the time the cause was regularly assigned for hearing upon the calendar, and was, in essential effect, the equivalent of formally setting out the motion in the brief.

The next point urged in favor of striking respondents' motion to dismiss is that it is based upon certain proceedings of the court below, the records of which have not been certi-

Dec. 1907]

Opinion Per HADLEY, C. J.

fied. Appellant cites Bal. Code, § 6513, and argues that it requires that matter in support of a motion to dismiss an appeal, upon other than jurisdictional grounds, must be brought to the attention of this court by a supplemental record. It is true a respondent may, under such statute, have a supplemental record certified, but it is not provided that a motion to dismiss an appeal may not be supported by affidavit containing a copy of the record as a part of the affidavit. Such an affidavit, undenied when the other party has opportunity to deny it, is, we think, ample support for a motion to dismiss, if the record it sets up warrants a dismissal. If such an affidavit were denied and a conflict should thereby arise as to the contents of the record, this court would doubtless then require a certification of the record. The motion to dismiss is supported by the affidavit of John W. Roberts, and the affidavit contains full copies of the findings of facts, conclusions of law, and the final decree of the court after trial, showing that the temporary receivership has ceased and that a permanent receiver has been appointed. The affidavit not being denied, it is sufficient for the reasons heretofore stated to challenge our consideration. Appellant's motion to strike the motion to dismiss the appeal is therefore denied.

We think the motion to dismiss the appeal is well taken, the appeal being from an order appointing a temporary receiver, and such a receivership being no longer in existence, the controversy involved in the appeal has ceased. This court has uniformly refused to entertain appeals where the controversy has ceased pending the appeal, and mere questions of cost and expense will not be considered. The motion to dismiss the appeal is granted.

MOUNT, DUNBAR, ROOT, and CROW, JJ., concur.

FULLERTON and RUDKIN, JJ., took no part.

[No. 6971. Decided December 7, 1907.]

THE STATE OF WASHINGTON, *Appellant*, v. CARRIE D.  
WALKER, *Respondent*.<sup>1</sup>

CONSTITUTIONAL LAW—CLASS LEGISLATION—POLICE POWER—LICENSES—BARBERING. Laws 1901, p. 349, regulating the business of barbering and requiring a license therefor, is not unconstitutional as an abridgment of the liberty and natural rights of the citizen; since it is a proper health regulation within the police power.

SAME—STATUTES—INVALIDITY OF PART—EFFECT. The unreasonable provision restricting the granting of a license, for the practice of the trade of barbering, to apprentices of two years standing, does not render unconstitutional the whole act, Laws 1901, p. 349, regulating such trade and requiring a license therefor.

RUDKIN, J., dissenting.

Appeal from a judgment of the superior court for Pierce county, Snell, J., entered June 15, 1907, upon sustaining a demurrer to the information, dismissing a prosecution for the offense of engaging in the occupation of barbering without having obtained a license. Reversed.

*H. G. Rowland, Robert M. Davis, and H. G. Fitch*, for appellant.

*Leo & Cass*, for respondent.

MOUNT, J.—The respondent was charged with the offense of practicing the occupation of barbering in the city of Tacoma, without having obtained a certificate or license therefor, under the act of March 18, 1901. (Laws 1901, page 349.) The lower court sustained a demurrer to the information, upon the ground that the said act is unconstitutional, and dismissed the action. The state appeals.

The only question in the case is whether the act is valid under the state and Federal constitutions. In the case of *State v. Sharpless*, 31 Wash. 191, 71 Pac. 737, 96 Am St.

<sup>1</sup>Reported in 92 Pac. 775.

Dec. 1907]

Opinion Per MOUNT, J.

893, the validity of this act was questioned upon several grounds, and we there held that the act was not unconstitutional upon any of the grounds claimed. Respondent now seeks to justify the ruling of the lower court upon the ground that the act is an abridgment of the liberty and natural rights of the citizen, which point was not passed upon in the *Sharpless* case. The case of *State ex rel. Richey v. Smith*, 42 Wash. 237, 84 Pac. 851, with the authorities therein cited, is relied upon as supporting the ruling of the lower court. That was a case where we were considering an act to regulate plumbing in certain cities of the state. We there said:

"The power of the legislature to make all needful rules and regulations for the health, comfort, and well-being of society cannot be questioned, but there are certain limits beyond which the legislature cannot go without trenching upon liberty and property rights which are safeguarded by the state and Federal constitutions."

We also said:

"Acts of similar import but relating to different professions, trades, and occupations have often been before this court. Thus, in *State v. Carey*, 4 Wash. 424, 30 Pac. 729, an act regulating the practice of medicine and surgery, was sustained. In *State ex rel. Smith v. Board of Dental Examiners*, 31 Wash. 492, 72 Pac. 110, and in *In re Thompson*, 36 Wash. 377, 78 Pac. 899, a similar act regulating the practice of dentistry was upheld. In *State v. Sharpless*, 31 Wash. 191, 71 Pac. 737, involving the validity of the act regulating the business of barbering, a similar ruling was made. But in *In re Aubrey*, *supra*, an act regulating the business of horseshoeing, was declared unconstitutional, and without the police power of the state. Some of the acts considered in the above cases were manifestly needful and proper for the protection of the public health, others were on the border line."

By these last words the writer of that opinion evidently referred to the act relating to barbering. After further discussing the authorities and particularly considering the case before us, we concluded as follows:

'We are satisfied that the act has no such relation to the public health as will sustain it as a police or sanitary measure,

and that its interference with the liberty of the citizen brings it in direct conflict with the constitution of the United States.”

We adhere to the rule and reasoning of that case. But there is a clear distinction between that case and this. The business of plumbing only remotely affects the public health. The skill or cleanliness of the plumber himself does not immediately affect the public any more than the skill or cleanliness of the ordinary scavenger affects it, because the business of plumbing does not bring the plumber in personal contact with the public. But the physician, the surgeon, the dentist, and the barber operate directly upon the person, and therefore affect directly the health, comfort, and safety of the public. We think this marks the principal distinction between that class of trades, professions, or callings which may be regulated by law for public health, comfort, and safety, and that class which cannot be so regulated without depriving a citizen of his natural rights and privileges guaranteed him by fundamental law.

Respondent further takes the position that the act is void because it is manifest therefrom that the same was not passed as a measure to insure the public health, but solely to create a monopoly of barbers in this state, and as supporting that position our attention is called to that part of § 10 which provides, as a prerequisite to obtaining a certificate of registration, that the applicant “has studied the trade for two years as an apprentice under or as a qualified and practicing barber in this state or other states.” It is claimed that this provision was made to destroy schools where barbering was taught in this and other states, and permitted practicing barbers to limit the number of applicants by refusing to receive apprentices. This provision, no doubt, gives strong color to the charge made; but we think it is not of itself enough to avoid the whole act. The legislature or the board of examiners, when authorized so to do, may make and enforce reasonable rules and regulations in order to determine the qualification of

Dec. 1907]

Dissenting Opinion Per RUDKIN, J.

applicants to practice that occupation. Unreasonable, arbitrary provisions cannot be enforced. We think the provision quoted is both unreasonable and arbitrary. What the public is interested to know is that the barber is competent. How he has acquired his skill or knowledge is of minor importance. If he has qualified himself by attendance upon some school for that purpose, or by his own efforts, unassisted, or by having served an apprenticeship under some qualified barber, or in some other equally efficacious way, that is all that can reasonably be required of him. To limit the qualification to one particular way or to one particular place, where there are many universally recognized as equally good, and provide that none others need apply is no doubt unreasonable. The result is that this requirement of the act is void. But that does not render the whole act void. In order to sustain the judgment in this case, it is necessary to avoid the whole act, which we cannot do.

The judgment must therefore be reversed, and the cause remanded for further proceedings.

ROOT and DUNBAR, JJ., concur.

FULLERTON, J., concurs in the result.

HADLEY, C. J. and CROW, J., took no part.

RUDKIN, J. (dissenting)—The general principles underlying legislation of this kind were fully discussed by the writer in the case of the *State ex rel. Richey v. Smith*, 42 Wash. 237, 84 Pac. 851, and will not be restated here. I feel constrained, however, to quote again the language of Mr. Justice Peckham, in *People ex rel. Nechamcus v. Warden of City Prison*, 144 N. Y. 529, 39 N. E. 686:

"It seems to me most unfortunate that this court should, by a strained construction of the act as a health law, give its sanction to this kind of pernicious legislation. We shut our eyes to the evident purpose of the statute, and by means of maxims well enough in their way, but sadly out of place here, impute a purpose to the legislature which it plainly did not have, and

which, if it did have, it has failed to carry out, even conceding that the purpose could be legitimately affected by other means. This measure detracts from the liberty of the citizen acting as a tradesman in his effort to support himself and his family by the honest practice of a useful trade, and I think no court ought to sanction such legislation unless it tends much more plainly than does this act toward the preservation of the health of the public."

The majority concede that the act (Laws 1901, page 349) can only be sustained on the theory that "Shaving the face or cutting the hair or beard of any person either for hire or reward," involves the public health, safety and comfort. Let us examine the act in detail, for the purpose of ascertaining how and wherein the public health is safeguarded or protected.

Section 1 of the act declares it unlawful to follow the occupation of barbering in any incorporated city of the state, without first obtaining a certificate of registration as therein provided. Section 2 defines what shall constitute barbering. Section 3 provides for a board of examiners to be appointed by the governor and fixes their term of office. Section 4 makes provision for a president, secretary, and treasurer, a common seal, and headquarters. Section 5 makes provision for the treasurer's bond and that the cost thereof shall be paid out of the funds in his hands. Section 6 provides for the compensation and traveling expenses of the members of the board. Section 7 provides for a biennial report to the governor. Section 8 provides for examinations to be held by the board. Section 9 makes provision for the registration of those engaged in the occupation of barbering at the time of the passage of the act. Section 10 makes provision for the examination of applicants for certificates of registration under the act, and will be recurred to later. Section 11 provides for apprentices. Section 12 provides for the issuance of certificates of registration. Section 13 provides for the registration of the names of all persons to whom certificates may be issued under the act. Section 14 provides for the revocation of certificates. Section

Dec. 1907]

Dissenting Opinion Per RUDKIN, J.

15 provides a penalty for practicing the occupation of barbering in any city of the first, second or third class, without first obtaining a certificate of registration; or for using, or allowing towels to be used, on more than one person before such towels have been laundered, or razor, lather, or hair brushes, on more than one person before the same have been sterilized, or for employing an unregistered barber.

It will thus be seen that only sections 10, 14 and 15 refer, even remotely, to the public health, safety or welfare. Section 10 provides that before issuing a certificate of registration the board shall be satisfied that the applicant is: (1) Above the age of 18 years; (2) of good moral character; (3) free from contagious or infectious diseases; (4) has studied the trade for two years as an apprentice under a qualified and practicing barber in this or other states; (5) is possessed of the requisite knowledge to properly perform all the duties, including his ability in the preparation of tools used in shaving, cutting of hair and beard, and all the various services incident thereto; and (6) has sufficient knowledge of the common diseases of the face and skin to avoid the aggravation and spreading thereof in the practice of his trade.

The age limit is the first requirement. This is a matter of minor importance, but how it can affect the health, safety, or comfort of either the applicant or the public, I confess I do not know. The second requirement is that the applicant be of good moral character. Why a person should be debarred from the occupation of barbering because of his moral character, I do not know. Certainly neither trust nor confidence is reposed. It may be said that the barber may pick our pockets, but the act seems to favor that enterprise. The third requirement is that the applicant be free from contagious or infectious diseases. This is highly important, but I presume it will not be gainsaid that it is of equal or even greater importance that hotel clerks, ticket agents, conductors, bank cashiers, and all those engaged in the thousand and one of the

common vocations of life, with whom the public are brought in hourly contact, should be equally free from such diseases. Furthermore, how is the condition of the applicant to be determined. Just as one might expect under the provisions of such an act. By a board of barbers who are entirely ignorant on the subject. The next requirement is two years apprenticeship under some practicing barber. I will not add to the strictures of the majority on this requirement further than to say that it is but one of the *indicia* of the trust character of the act. The next requirement relates exclusively to the skill of the applicant in his trade, and in no manner affects the public health or safety. The last requirement is that the applicant have a sufficient knowledge of the common diseases of the face and skin to prevent their aggravation and spread. The legislature might well provide that razors, towels, and other instruments and appliances used in the trade should be sterilized and cleansed, and make the provision applicable to all parts of the state, and to all barbers within the state; for in the absence of some authoritative statement from the barber board, I will assume that a dirty towel is just as unsanitary in one community as in another. A commission, with the expense of maintaining it, and the unlawful and unjustifiable interference with the right of the citizen to engage in one of the common occupations of life, is neither a necessary nor an appropriate means to that end. This section also provides for the renewal of certificates each year. I was at first at a loss to know why a barber's certificate should not remain good until revoked, but the act answers that question. "All certificates shall be renewed each year, *for which renewal, a fee of fifty cents shall be paid.*" Section 14 provides for the revocation of certificates, for the conviction of crime, drunkenness or having or imparting any contagious or infectious disease. These provisions, as well as those of § 15, I have already discussed.

I have now reviewed every material provision of the act, and again ask how it can be sustained as a sanitary measure.

Dec. 1907]

Opinion Per DUNBAR, J.

To paraphrase what we said in the *Richey* case: We are not permitted to inquire into the motives of the legislature, and yet, why should a court blindly declare that the public health is involved, when all the rest of mankind know full well that the control of the barber business by the board and its licensees is the sole end in view. We are satisfied that the act has no such relation to the public health as will sustain it as a police or sanitary measure, and that its interference with the liberty of the citizen brings it in direct conflict with the constitution of the United States.

The judgment of the court below should be affirmed.

[No. 6975. Decided December 7, 1907.]

L. L. BOGARD, *Respondent*, v. D. E. BARTRUFF *et al.*,  
*Appellants*.<sup>1</sup>

APPEAL—REVIEW—VERDICT—SUFFICIENCY OF EVIDENCE. A verdict for \$477.50, the exact amount claimed on a first cause of action, will not be set aside on appeal as contrary to the evidence from the fact that the plaintiff's proof showed no such sum due on such cause of action, where the amount admitted to be due on the first cause of action, added to the amount claimed by the plaintiff upon a second cause of action, supported by his evidence, came to \$477.40; since the verdict might have been arrived at by such computation, and ten cents is too small a discrepancy to be noticed by the courts.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered June 3, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

*Bugge & Swartz*, for appellants.

*H. M. White* and *R. W. Greene*, for respondent.

DUNBAR, J.—The second amended complaint, the only complaint which is before this court for consideration, declares, on

<sup>1</sup>Reported in 92 Pac. 778.

a first cause of action, for wages from September 3, 1903, to November 16, 1906, \$477.50; the second cause of action, for overtime from July 1, 1904, to November 6, 1906, \$328.50. Against this complaint the appellants interposed a motion to strike and a demurrer to the complaint, both of which were overruled. Thereafter appellants answered, the answer admitting that there was \$135.10 due the respondent on the first cause of action, and denying *in toto* the second cause of action. The respondent testified that, on July 1, 1904, his salary, which theretofore had been \$25, was raised at the suggestion of the appellant D. E. Bartruff to \$30 per month, and that he had informed the appellant that he would charge him for overtime, the contract, according to his statement, being that he should work from twelve o'clock midnight until one o'clock the next day. The answer of the appellants admitted the services rendered, but alleged that the contract price was \$25 per month during all the time the services were rendered, excepting one month, during which time it was admitted that the respondent was to receive a salary of \$30, and denied that any demand had been made for overtime. A reply was interposed to this answer, and the cause proceeded to trial to a jury, with the result that a verdict was rendered in favor of the respondent for the sum of \$477.50.

Assignments of error are to the effect that the court erred in refusing appellants' motion to strike the second amended complaint; in overruling appellants' motion for nonsuit as to respondent's first cause of action; in denying appellants' motion for nonsuit as to respondent's second cause of action; in denying appellant's motion for an instructed verdict in favor of appellants; in denying appellants' motion to dismiss, as against the appellant Maud Bartruff; in overruling appellants' motion for a new trial; and the eighth assignment is that the verdict and judgment are not sustained by the evidence. The complaint in this action is brought so plainly within the provisions of the statute that there does not seem

Dec. 1907]

Opinion Per DUNBAR, J.

to be any merit in the contention that the court erred in denying the motion to strike or in overruling appellants' demurrer. All the other alleged errors may be discussed under the eighth assignment, viz., that the verdict and judgment are not sustained by the evidence.

It is contended by the appellants that, inasmuch as the verdict was for \$477.50 and that inasmuch as \$477.50 was the amount demanded in the first cause of action, the jury must have ignored the second cause of action and have allowed the full amount demanded in the first cause of action; and that, inasmuch as the testimony does not sustain the respondent in his demand for \$477.50 on the first cause of action, the verdict was necessarily wrong. The plaintiff testified that there was due him on his first cause of action \$463.60, and on his second cause of action \$328.50. If the jury believed the testimony of the respondent to the effect that he had notified the appellant that he would charge him for overtime, and believed his testimony in regard to overtime which he claimed to have worked—there really being no proof that the plaintiff did not work the number of hours that he claimed to have worked overtime—and had added to the \$328.50 legal interest on that amount for which they sued, from the time the services were rendered until the date of the trial, which would have been \$13.80, and \$135.10, the amount admitted to be due on the first cause of action, it will be seen that it would have amounted to \$477.40, or within ten cents of the amount of the verdict rendered, which is too small a discrepancy for the court to take notice of, and would thereby account for the verdict of the jury on a proper computation. It is contended by the appellants that this is a strained theory of construction, but under all the testimony in this case it seems to us to be a reasonable one.

There are also other theories not necessary to mention which would reasonably account for the amount of the verdict. The testimony reported to this court is exceedingly meager,

being in narrative form, and the accounts were not kept in the most approved manner; but they were submitted to the jury; and from such accounts, together with the oral testimony in the case, it arrived at the conclusion expressed in the verdict. We should not too closely scan the processes of computation used by jurors in coming to conclusions; but in this case the verdict, as we have seen, was not inconsistent with the proofs, the motion for a new trial was passed upon by the court who presided at the case and heard the testimony, and we do not feel justified, under such circumstances, in disturbing the verdict rendered, it not being the province of this court to try the case *de novo*.

So far as the claim is concerned that the court erred in denying appellants' motion to dismiss, as against the appellant Maud Bartruff, the wife of appellant D. E. Bartruff, we think the testimony of Mrs. Bartruff is conclusive that she was a party interested, and that the services rendered were for her benefit as a member of the community.

The judgment is affirmed.

HADLEY, C. J., ROOT, MOUNT, CROW, RUDKIN, and FULLERTON, JJ., concur.

[No. 6938. Decided December 9, 1907.]

M. J. ROGERS *et al.*, *Respondents*, v. MINNEAPOLIS  
THRESHING MACHINE COMPANY, *Appellant*.<sup>1</sup>

PUBLIC LANDS—HOMESTEAD—MORTGAGE. A homestead claimant may mortgage the homestead after final proof, before the issuance of a patent.

HUSBAND AND WIFE—COMMUNITY PROPERTY—PUBLIC LANDS—HOMESTEAD MORTGAGE. A homestead settled upon and improved by a man before marriage, to whom patent is issued therefor after final proof, is his separate property; and his wife need not join in a mortgage thereof.

APPEAL—BONDS—SUPERSEDES—DESCRIPTION OF JUDGMENT—LIABILITY OF SURETY. An appeal by a lien claimant from a judgment declaring the priority of and foreclosing a mortgage, with an application for an order fixing the amount of the bond to supersede the judgment "and the whole thereof," wherein the bond given showed on its face that it was given for that purpose and in terms stayed the whole judgment, is an appeal from the whole judgment and not merely from that part declaring the priority of the liens; and upon affirmance, the surety is liable for the full amount of the judgment.

Appeal from a judgment of the superior court for Douglas county, Steiner, J., entered April 1, 1907, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to foreclose mortgages upon a homestead. Affirmed.

*J. B. Campbell* and *J. D. Campbell*, for appellant.

*Danson & Williams* (*Fred H. Moore*, of counsel), for respondent.

DUNBAR, J.—The undisputed facts in this case are briefly as follows: Lewis E. Badger filed on his government homestead in March, 1898. He was married when he filed, but his wife died in October, 1901. He married Maggie V. Badger

<sup>1</sup>Reported in 92 Pac. 774; 95 Pac. 1014.

in January, 1903, and lived on his government homestead with her until he made final proof on said homestead May 1, 1903. He and his wife mortgaged said homestead to M. J. Rogers, respondent, May 4, 1903. He, his wife not joining, mortgaged said homestead to Russell & Company, respondent, on June 11, 1903. Patent to said homestead issued to Lewis E. Badger, June 21, 1904. Lewis E. Badger, his wife joining with him, mortgaged said homestead to appellant, the Minneapolis Threshing Machine Company, on the 31st day of July, 1905. This was an action to foreclose the aforesaid mortgages, and the court found the mortgages respectively had been properly executed, and the amount due on them, and that they were all entitled to foreclosure; but found that the mortgage to M. J. Rogers was a first lien on the property; that the mortgage to Russell & Company was a second lien on the property, and that the mortgage to the appellant Minneapolis Threshing Machine Company, a corporation, should be satisfied out of the property subject to the aforesaid mortgages.

The appellant makes two contentions: first, that the mortgage to M. J. Rogers is not a valid lien on said land, because, at the time that Lewis E. Badger and Maggie V. Badger executed the same, the patent had not been issued, and title was still in the Federal government, and they could not, therefore, make a valid mortgage on said land; second, that as Lewis E. Badger was a married man at the time final proof was made, said land was the community property of himself and his wife; and as the mortgage which Lewis E. Badger gave to Russell & Company was not joined in by his wife, the same is void, and consequently the mortgage given to the Minneapolis Threshing Machine Company is a first lien on said premises.

The first proposition has been directly decided adversely to the appellant's contention in *Boggan v. Reid*, 1 Wash. 514, 20 Pac. 425, and in *Weber v. Laidler*, 26 Wash. 144, 66 Pac.

Dec. 1907]

Opinion Per HADLEY, C. J.

400, where, after an exhaustive review of the authorities, the court made the following announcement:

"Thus, it appears that the overwhelming weight of authority is in favor of sustaining mortgages executed prior to the issuance of a patent."

The second proposition has been as conclusively decided by this court in *Forker v. Henry*, 21 Wash. 235, 57 Pac. 811, where it was decided that a homestead, settled upon and improved by a woman before her marriage, who continued to reside thereon with her husband after her marriage, and to whom a patent was issued therefor after final proof, was her separate property, the court, after a review of the authorities, saying:

"A consideration of the authorities from those states in which the community property law exists seems to establish the principle 'if either spouse before the marriage has acquired an equitable right to property which is perfected after marriage, the property is separate.'"

It will be seen that this case involved precisely the same state of facts upon which appellant bases its claim in the case at bar. In consideration of the cases above cited, it becomes unnecessary to discuss the Federal cases cited and discussed in the briefs of respective counsel.

The judgment is affirmed.

HADLEY, C. J., ROOT, RUDKIN, and CROW, JJ., concur.

MOUNT and FULLERTON. JJ., took no part.

# ON MOTION TO MODIFY JUDGMENT.

[Decided May 28, 1908.]

HADLEY, C. J.—It was found by the trial court that all the mortgages were entitled to foreclosure. Personal judgment was entered against the mortgagors for the respective amounts and in favor of the respective mortgagees, and foreclosure was awarded as to all. But it was decreed that the mortgage of M. J. Rogers is a first lien, that of Russell

& Company a second lien, that of Minneapolis Threshing Machine Company a third lien upon the property, and that said liens should be satisfied from the sale of the property in the order above named. The Minneapolis Threshing Machine Company appealed. The notice of appeal described the appeal as being from "that certain final judgment rendered and entered in this cause on the first day of April, 1907, and from the conclusions of law made and rendered herein by the superior court of Douglas county, Washington." Application was also made to the court, asking that the amount of a supersedeas bond on appeal should be fixed. The application described the appeal as being from "the whole of the judgment," and the court entered an order fixing the amount of the bond required "to supersede said judgment and the whole thereof" at \$6,300. A bond was given by the appellant in the full sum of \$6,500, conditioned as an appeal and supersedeas bond, with the United States Fidelity and Guaranty Company as surety. The judgment of the trial court was affirmed by this court, and judgment was entered here against the appellant and the surety and in favor of the two respondents, for the respective sums rendered in their favor against the mortgagors below. The appellant has now moved to modify the judgment entered here so as to provide for the recovery from appellant and its surety of costs only.

Appellant contends that the record indicates that the appeal was taken merely to determine the priority of liens, and that it therefore involved a part of the judgment only. We think it is manifest from what we have above stated from the record that the appeal was from the entire judgment, and that the bond stayed all proceedings thereunder. It is argued that, as there was no money judgment entered against appellant below, there can be no judgment entered against it and the surety here, and the case of *Titlow v. Cascade Oatmeal Co.*, 16 Wash. 616, 48 Pac. 406, is cited. Judgment was sought in that case here against the appellant and his surety for the full amount of the judgment affirmed, but was denied. The

Dec. 1907]

Opinion Per HADLEY, C. J.

appeal was, however, expressly taken from a portion of the judgment only, and any stay of proceedings which resulted was merely incidental thereto. Here, however, the appeal was expressly taken from the whole judgment, the amount of the bond necessary to stay the whole judgment was asked and fixed, and the bond upon its face shows that it was given for that purpose, a fact known at the time to both the appellant and its surety. The bond in all respects complies with the requirements of Bal. Code § 6506 (P. C. § 1054) where it is sought to stay the whole judgment. The same section provides that, if it is intended to stay proceedings on only a part of the judgment, the bond shall be so varied as to secure the part stayed alone. Such was not done here, but proceedings under the whole judgment were entirely stayed. Respondents were not only precluded from effecting a sale of the mortgaged premises, but they were also prevented from enforcing their respective shares in the personal judgment by means of ordinary execution. The bond expressly provided for the satisfaction and performance of the judgment appealed from, in case that judgment should be affirmed by this court, and by the terms of Bal. Code § 6523 (P. C. § 1071), it was proper under such circumstances, to enter judgment here against both the appellant and surety for the full amount of the judgment below. In view of the statutory provisions, the bond became in the nature of a contract agreeing that judgment might be at once entered here against both appellant and the surety in the event of an affirmance. The consideration for such agreement was the benefit to be derived from a stay of all proceedings meanwhile.

The motion is denied.

FULLERTON, RUDKIN, CROW, DUNBAR, ROOT, and MOUNT, JJ., concur.

[No. 6983. Decided December 10, 1907.]

F. J. HOLMAN, *Appellant*, v. T. M. COOPER *et al.*,  
*Respondents*.<sup>1</sup>

ATTACHMENT—DISSOLUTION—GROUNDS. A motion to dissolve an attachment upon the ground that the property attached was exempt is not warranted by Bal. Code, § 5376, authorizing a dissolution of an attachment that has been improperly or irregularly issued.

SAME — APPEARANCE OF DEFENDANT. Nonresident defendants, whose real estate has been attached, cannot, under Bal. Code, § 5376, move to dissolve the attachment until after a general appearance is made submitting themselves to the jurisdiction of the court.

Appeal from an order of the superior court for Lincoln county, Warren, J., entered May 14, 1907, in favor of the defendants, dissolving an attachment upon real estate, after a trial on the merits before the court without a jury, in an action upon a promissory note. Reversed.

*Gallagher & Thayer*, for appellant.

*Merritt, Hibschan, Oswald & Merritt*, for respondents.

DUNBAR, J.—The plaintiff brought suit upon a promissory note for \$5,000, signed by the defendant T. M. Cooper and others. The complaint contained the usual allegations of execution, of nonpayment, of reasonable attorney's fees, etc., and alleged that the defendants were husband and wife at the time the note was signed by the defendant T. M. Cooper. An affidavit was made, setting forth as a ground of attachment that the defendants were both nonresidents of the state of Washington, and that it was sought to attach the real estate only of the defendants. Bond was given in pursuance of the provisions of the statute, sureties qualified according to law, the attachment was issued, and a levy of certain real estate was made. The defendants appeared specially and moved to

<sup>1</sup>Reported in 92 Pac. 781.

Dec. 1907]

Opinion Per DUNBAR, J.

dissolve the attachment, upon the record and files and upon the affidavits attached to the motion. The affidavits were, in substance, that the note upon which the suit was founded was a surety obligation of the defendant T. M. Cooper, and that the property attached was the community property of the defendants and not subject to attachment for that debt. No contention was made that the complaint was insufficient to state a cause of action, or that the affidavit for attachment was insufficient, that the bond was insufficient, or that the clerk should not have issued the attachment; the sole contention being that the debt was a surety debt of Cooper, and that the property attached was not liable for that debt. The plaintiff appealed from the order dissolving the attachment.

Many cases cited by the appellant to sustain the contention that the merits of the case cannot be entered into on a motion to dissolve the attachment, but that the attachment can only be dissolved by showing that it was improperly or irregularly issued, undoubtedly state the general rule, but they are of very little benefit to the court in the investigation of this case, for the reason that they are mainly cases where it was assumed that the property in controversy, and which had been attached, was the property of the defendant; while in this case the contention is, not that the writ of attachment was improperly sued out, but that the particular property attached was not subject to the attachment. Neither is this a case where the parties making the motion to dissolve the attachment are strangers to the record, both parties here, the husband and wife, having been sued. So that it seems to us that it narrows itself to the question of what questions can be raised under the motion to dissolve the attachment.

An attachment is a purely statutory matter, and before the writ can be issued, the requirements of the statute must be strictly met. The dissolution of an attachment is equally statutory, and the mandates of the statute in that respect must also be complied with. Our statute provides, Bal. Code,

§ 5376 (P. C. § 536), that the defendant may, at any time after he has appeared in the action, apply upon motion, to the court in which the action is brought or to the judge thereof, that the writ of attachment be discharged on the ground that the same was improperly or irregularly issued. No such application was made in this case, the ground of the motion not being that the attachment was improperly or irregularly issued, but that the property levied upon was exempt from seizure under the writ of attachment. So that it is plain that the requirements of the statute have not been met in that respect. But in addition to this, the statute requires, as a prerequisite to making this motion, that the defendants must appear in the action; and the record in this case does not show that the defendants did appear, but shows that a special appearance was made for the purpose of making the motion. A special appearance in our judgment is not the appearance contemplated by the statute, but the statute requires an appearance in the action for the purpose of trying the issues involved in the action, an appearance by which the defendants submit themselves to the jurisdiction of the court. This question was squarely passed upon by Judge Hanford in *Feurer v. Stewart*, 82 Fed. 294, and it was there held that the defendant had no right to move to dissolve the attachment without first entering a general appearance in the action.

The judgment will be reversed, with instructions to overrule the motion to dissolve the attachment.

HADLEY, C. J., CROW, RUDKIN, FULLERTON, and MOUNT, JJ., concur.

Dec. 1907]

Opinion Per DUNBAR, J.

[No. 6998. Decided December 10, 1907.]

**JERRY MEEKER *et al.*, Respondents, v. AGNES WINYER *et al.*,  
Appellants.<sup>1</sup>**

**JUDGMENT—RES JUDICATA—COURTS.** A judgment of the superior court in a probate proceeding is conclusive upon the parties thereto, where the same matters are subsequently sought to be raised in a civil action.

**INDIANS—LANDS—ALLOTMENT—PATENT—PRESUMPTION.** Where the law provides that an Indian allotment may be assigned, upon a patent to one Indian of land allotted to another, it will be presumed that the allotment was duly assigned.

**SAME—TRIBAL RELATIONS—EVIDENCE.** The fact that an Indian had belonged to another tribe, does not disprove that his relations therewith had been severed and that he had become a member of another tribe and entitled to hold land as such.

**SAME—PATENT IN TRUST—FRAUD—EVIDENCE.** A patent to an Indian, the son-in-law of the original allottee, will not be set aside as a fraud upon, or held to be in trust for, the original allottee, where it appears that she knew of the issuance of the patent to her son-in-law, had lived on the land with her family without making any claim thereto, and no claim was made by her heirs having knowledge of the patent until nearly twenty years after its issuance, more than a decade after the death of the patentee, and several years after the death of the original allottee.

Appeal from a judgment of the superior court for Pierce county, Gilliam, J., entered April 4, 1907, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action for partition. Affirmed.

*Jas. J. Anderson* and *H. P. Burdick*, for appellants.

*F. Campbell*, for respondents.

**DUNBAR, J.**—This is an action brought by the plaintiffs for the partition of 39.70 acres of land, being part of what was formerly the Puyallup Indian reservation, Pierce county, Washington. This land, the testimony showed, was occupied

<sup>1</sup>Reported in 92 Pac. 883.

in the early days by a Puyallup Indian named Quoquilton and Elizabeth Do-do-lit-za, his wife. These people were the maternal grandparents of the defendants in this action, John A. Milcane and Charles Winyer. Before the allotment of lands in the Puyallup reservation was made to the Indians, under the treaty of 1854, Quoquilton died, and the testimony showed that Elizabeth Do-do-lit-za continued to reside on the land, her daughter Mary living with her. Mary was the mother of the defendants John A. Milcane and Charles Winyer. Mary married a man named Milcane, and the defendant John A. Milcane is the issue of said marriage. Milcane afterwards died, and in the year 1877 Mary married John Winyer, and several children were born to Mary and John as the issue of said marriage, among whom was Charles Winyer, the defendant in this action. A patent was issued to the land in question to John Winyer, on January 30, 1886. Winyer died May 24, 1890, and Mary married one John Seattle, who lived on the land with her some two or three years, when Mary died, leaving her mother, her husband, and her two sons, the defendant John A. Milcane and Charles Winyer. John Seattle then went away from the land and has not since resided on it. Elizabeth continued to reside on the land until her death, which occurred in 1903. There was no administration upon the estate of John Winyer until May, 1903, thirteen years after the death of Winyer, when the estate was probated and a distribution made among divers and sundry heirs not necessary to mention here, the defendants in this action being among said heirs receiving distribution. The defendants not being satisfied with the distribution, and refusing to cooperate with the others, this action was brought for partition. The court found the issues in favor of the respondents, the plaintiffs in the action below, and from the judgment entered the defendants have appealed.

The record of the former action in the probate court was introduced over appellants' objection, and it is claimed by the

Dec. 1907]

Opinion Per DUNBAR, J.

respondents that such record shows that the appellants are estopped from urging their claims in this action. We think this contention must be sustained; for while it is true that the appellants in this action are setting up a right to the interest in the property from another source than that of John Winyer whose estate was administered upon, the record shows that both the appellants appeared in that action, challenged the jurisdiction of the court, and tendered the same issues that they have tendered in defense of the present action; and while some of the earlier cases of this court may have maintained the distinction between proceedings in the probate court and other more formal actions or proceedings, these distinctions have been obliterated by subsequent adjudications of this court. The case squarely in point and decisive of this case is *Fillee v. Murphy*, 30 Wash. 1, 70 Pac. 107. There the contention was made that matters pertaining to probate should be referred to what was called "probate procedure," as distinguished from what was denominated "civil" or "criminal procedure." The court, in passing upon that question, said:

"It is assigned as error that the court overruled appellant's demurrer to the petition for citation. This assignment is based upon the theory that the petition showed upon its face that the title and right of possession to certain property were involved, and that the court sitting in a probate proceeding could not hear it. If the demurrer had been interposed to the petition before the issuance of the citation, the question would then have been presented whether, under the facts stated, relief by way of citation could be had; but, in any event, we think the court might have proceeded to settle issues under the petition for trial. In this state we have no probate court, properly speaking, as distinguished from the court that entertains jurisdiction of other matters. The court of general jurisdiction also hears and determines probate matters. Matters pertaining to probate are referred to what is called 'probate procedure,' as distinguished from what is denominated 'civil' or 'criminal procedure.' But when the court, sitting in a probate proceeding, discovers in a petition the statement of facts which forms the basis of a controversy, we see no reason why

it may not settle the issues thereunder when an appearance has been made thereto, and then proceed to try it in a proper manner, as any other civil cause."

In this case the basis of the controversy was formed by the contentions of the appellants in the probate case. The issues there made were considered and determined by the court, and such determination and judgment of the court was adverse to the appellants' contention. Such judgment was not appealed from, the time for such appeal has long since expired, and the judgment of the court is therefore binding upon the parties to the proceeding.

But outside of the question of estoppel, this case should be affirmed on the merits. It is true that the record shows that an allotment had been made to the grandmother of these appellants, Elizabeth Do-do-lit-za, many years before the patent had been issued to John Winyer. The law provides, however, that such allotments may be transferred or assigned to the government or to any member of the tribe, and when the government afterwards patented this land to John Winyer and his family, it must be presumed that the assignments had been made and that the officers of the government did their duty. There is some contention that John Winyer was not a member of the Puyallup tribe. But Mr. Eells, who was agent of the Puyallup reservation at the time of the residence of Winyer thereon, testified that he was acquainted with him and that he was regarded as a member of the tribe. The fact that he had previously belonged to another tribe in no way disproves the fact that, at the time the patent issued, he had severed his tribal relations with the Nisquallics and become a member of the Puyallup tribe. It is probable from all the facts related that he did so.

It is contended by the appellants that, while they concede that the patent was issued to Winyer, Winyer took the title to the land in trust for Elizabeth Do-do-lit-za, and that it was issued to Winyer by the officer of the government through

Dec. 1907]

Opinion Per DUNBAR, J.

mistake. But the language of the patent shows that the government was familiar with the circumstances of the case at the time it was issued. It shows that there had been deposited in the general land office of the United States an order bearing date January 20, 1886, from the secretary of the interior, accompanied by a certificate dated October 30, 1884, from the office of Indian affairs, with a list approved October 23, 1884, by the president of the United States, showing the names of members of the Puyallup band of Indians who had made selection of land in accordance with the provisions of the treaties controlling such selection, "in which list," says the patent, "the following tract of land has been designated as the selection of John Winyer;" and his domestic relations are particularly described as follows: "The head of a family consisting of himself and Mary, Johnny, Tommy, Jane and baby," describing the lot in controversy and then proceeding to convey the land to him by patent in a formal manner.

There is no proof whatever that there was any fraud or deception practiced upon Elizabeth Do-do-lit-za, and while it is true the evidence showed that she lived on this land, she lived there with her daughter and her family, making no claim whatever to the land, although she knew, according to the testimony of the appellant Milcane, that the land had been patented to her son-in-law. Milcane himself knew it, and had communicated the fact to the witness Williams during the lifetime of Winyer, and no claim was made affecting the legality of the patent for nearly twenty years after the same had been issued, for more than half a decade after the death of Winyer, and for several years after the death of Elizabeth Do-do-lit-za through whom these appellants claim title. A muniment of title of the dignity and force of a patent of the United States government should not be set aside upon such testimony as appears in this cause.

The judgment of the lower court is affirmed.

HADLEY, C. J., CROW, RUDKIN, FULLERTON, MOUNT, and ROOT, JJ., concur.

[No. 7023. Decided December 10, 1907.]

AUGUST H. RICHTER, *Respondent*, v. JOHN BUCHANAN *et al.*,  
*Appellants*.<sup>1</sup>

CHATTEL MORTGAGES—NATURE—TITLE—POSSESSION. Possession by the mortgagee of chattels, under a stipulation therefor in the mortgage, does not change the rule in this state that the legal title remains in the mortgagor.

SAME—POWER OF SALE—CONSTRUCTION. A power of sale in a chattel mortgage, authorizing the mortgagee to sell at retail, does not authorize a sale in bulk of stock remaining after a partial sale at retail.

SAME—UNAUTHORIZED SALE—CONVERSION—DAMAGES. A mortgagee in possession of chattels, who was empowered by the mortgage to sell the goods at retail, is guilty of a conversion in selling in bulk; and is liable in damages to the mortgagor for the value of the property over and above the mortgage debt.

Appeal from a judgment of the superior court for Clarke county, McCredie, J., entered March 15, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for conversion. Affirmed.

*A. L. Miller*, for appellants.

*Rands & Connor* and *McMaster & Back*, for respondent.

DUNBAR, J.—This is an action for damages for conversion of property. The court found that, at the time the herein-after described contract was entered into, the plaintiff was the owner in possession of the stock of goods described; that, for the purpose of securing to be paid to said defendants the sum of \$2,628.37, then owing by plaintiff to defendants, plaintiff made, executed, and delivered to defendants a deed to the real estate described, and to further secure the payment of said sum, executed a chattel mortgage of the personal property, which was the stock of goods; that it was agreed in

<sup>1</sup>Reported in 92 Pac. 782.

Dec. 1907]

Opinion Per DUNBAR, J.

said chattel mortgage that defendants should have possession of such stock of goods and should proceed to sell the same at retail until the said sum of \$2,628.37 should be realized, with interest thereon, together with such sums as should be expended by defendants in making additions to the stock, and the sum of \$50 per month for defendants' services; that thereupon defendants took possession of the personal property, and for six weeks continued to sell such goods at retail at an average profit of fifteen per cent, and from such sale realized the sum of \$2,169.40; that during such six weeks defendants added to such stock to the value of \$1,662.58, freight \$42.65, making the value of the stock so added \$1,705.23, and that they were entitled under the agreement of chattel mortgage to \$75 as compensation for services in selling said goods; that upon the 15th day of April, 1904, the defendants, without the knowledge or consent of the plaintiff and without any proceedings to foreclose said mortgage, sold the remainder of the goods in bulk, and not at retail, for the sum of \$1,831; that at the time of such sale in bulk the value of the property remaining in the hands of defendants was the sum of \$3,399.34; that upon the 15th day of April there was due defendants from plaintiff the sum of \$2,628.37, plus paid for new goods and freight on same \$1,705.23, plus interest \$32, plus allowance of \$50 per month for one and one-half months, \$75; whole amount \$4,440.60, making a total due said defendants, after deducting the amount realized from sale of merchandise at retail, of \$2,271.20. From such findings it was concluded that the plaintiff was entitled to judgment against the defendants for the sum of \$1,128.14, and to a decree finding the deed aforesaid to be a mortgage and to be fully satisfied, and judgment for costs and disbursements to the plaintiff. The findings of fact substantially followed the allegations of the complaint.

So far as the pleadings are concerned, there is no question but that there was a flagrant violation of the contract by the

defendants. Paragraph 6 of the complaint alleges that it was agreed and stipulated in the chattel mortgage that the defendants should sell the goods at retail after the manner of good, careful and thrifty merchants until the amount of the indebtedness should be satisfied, and this paragraph is especially admitted in paragraph 3 of the answer. Paragraph 10 of the complaint alleges that on or about April 15, 1904, defendants, contrary to the terms of the agreement and without the knowledge or consent of plaintiff, and without proceeding in any court for the foreclosure of the mortgage, sold the remainder of the mortgaged property in bulk, to plaintiff's damage in the sum of \$2,000, and while the answer in words denies paragraph 10, the separate answer virtually admits the truth of the allegation in paragraph 10 of the complaint, except the allegation of damages, but justifies the breach by alleging that the goods left were odds and ends difficult to sell at retail, and that the defendants believed the remaining stock could be sold to a better advantage by selling the same in bulk, and that acting upon said belief they sold the same in bulk, and it was upon this theory that the cause was tried.

Some days after the trial, upon application of the defendants, the case was reopened for the purpose of admitting in evidence the chattel mortgage aforesaid, when the defendants asked leave of the court to amend their answer to correspond with the testimony, claiming that they had been misled in regard to the provisions of the chattel mortgage. This motion was denied by the court, to which ruling the defendants excepted; but the action of the court in denying the motion is not assigned as error here.

The court evidently construed the mortgage as bearing out the allegations of the complaint and the admissions of the answer as to the requirements that the goods should be sold at retail, and an examination of that instrument shows that, while the stipulation in that regard is not in the words of the complaint, the whole tenor of the instrument is plain to the

Dec. 1907]

Opinion Per DUNBAR, J.

effect that the goods were to be sold at retail. Any other construction would be inconsistent with many of the provisions therein expressed. That was evidently the understanding of the parties to the transaction, and was the construction placed upon it by the answer of the defendants.

But it is contended by the appellants that, in any event, the judgment of the court is not correct, for the reason that the action of the defendants did not constitute conversion, and that therefore the plaintiff was only entitled to such damages as he could show that he was entitled to by reason of the goods being sold in bulk instead of by retail, and many cases are cited to sustain this contention, and this is the general rule in jurisdictions where the legal title passes to the mortgagee. But in this state the legal title remains in the mortgagor and the mortgage is held to be but an incident of the indebtedness, and the goods are only impressed with a lien for the benefit of the mortgagee. This has been held so many times and so uniformly by this court that reference to cases is not necessary. In fact this proposition is conceded by learned counsel for appellants, but he seeks to distinguish this case from the ordinary chattel mortgage where the possession generally remains in the mortgagor, and contends that the other rule obtains where the possession is rightfully in the mortgagee. We do not think that mere possession by stipulation in the mortgage necessarily transfers the legal title. It simply gives the mortgagee such additional rights as are stipulated and no more. In this case it gave the right to possession and right to sell in a certain manner, and the answer of defendants that they acted on the belief that they could sell the goods in bulk to better advantage than they could at retail is no defense whatever; for if our construction of the mortgage is correct, that is a question which was the subject of the contract and had been determined by the contract.

The appellants cite *Bancroft-Whitney Co. v. Gowan*, 24 Wash. 66, 63 Pac. 1111, where it is held that where a chattel

mortgage gives a mortgagee the right in case of default in payment to take possession of the goods and retain them, such right of possession may be enforced by action of claim and delivery. But this case in no wise, it seems to us, sustains appellants' contention. The court, in the course of its discussion of that case, said:

"Neither did the plaintiff, as in the case of *McClellan v. Gaston*, *supra*, undertake to enforce its remedy outside of the law, but it has brought itself within the terms of the contract, and the contract is not susceptible of construction. Its terms are too definite, direct, and plain to be varied by oral testimony. It provides that the Bancroft-Whitney Company may take possession of said books and retain the same, or may sell them without taking possession of them. With this right plainly and unequivocally guaranteed to the company by the contract, it was warranted in bringing the action in the form in which it did bring it, for the purpose of obtaining possession of the property."

In that case it will be seen the mortgagees were strictly following the stipulations in the contract, and it was upon that ground that the court decided in their favor. But in this case, instead of the right to sell in bulk being unequivocally guaranteed to the mortgagees, the stipulation is exactly to the contrary, and they were proceeding in a manner which was prohibited by the contract. It is plain also that *Brockway v. Abbott*, 37 Wash. 263, 79 Pac. 924, fails to sustain appellants' contention; and while it is true that in that case we held that a mortgagee in possession for the purposes of security was not guilty of conversion by reason of delaying foreclosure after condition broken, while the right of foreclosure existed, and that the mortgagor could not recover the value of the property without redeeming from the mortgage debt, an examination of the case shows that the question under discussion, and passed upon by this court, was altogether different from the question at bar. There the appellant Abbott contended that the respondent's acts with reference to the mortgaged property amounted to a conversion of such prop-

Dec. 1907]

Opinion Per DUNBAR, J.

erty, rendering her liable for its actual value; that they took the goods as mortgagee in possession, and that there was such an unreasonable delay in disposing of them that the law implied a conversion, and this court in passing upon that question said:

"The possession of the mortgaged property by a mortgagee in possession does not become wrongful immediately upon condition broken, nor during the time the right of foreclosure exists. If the mortgagee actually converts the property, or suffers his right to foreclose to lapse from some other cause, then he becomes liable to account to the mortgagor for the value of the property over and above the mortgage debt. But so long as the property remains intact, and the right of foreclosure exists, the possession of the mortgagee is rightful, and the only remedy the mortgagor has, against the mortgagee, is to redeem from the mortgage debt; he cannot recover the value of the property because of mere delay in foreclosure."

But in this case it is conceded that the property did not remain intact, but that it was actually sold and passed out of the possession of the mortgagees, and there was no opportunity for the mortgagor to redeem. The case as a whole sustains the respondent rather than the appellants and announces the rule that, if the mortgagee actually converts the property, he becomes liable to account to the mortgagor for the value of the property over and above the mortgage debt, and that was the judgment which was rendered in this case. We think it hardly worth while to cite extensive authority on this proposition. In short, the mortgagees were in possession of this property as agents of the mortgagor to dispose of the property in the manner provided in the agreement, and not having disposed of it in that manner nor in the manner provided by law under the rule announced in the case just above cited, they become liable to the mortgagor for the value of the property over and above the mortgage debt.

The judgment is affirmed.

MOUNT, ROOT, RUDKIN, and FULLERTON, JJ., concur.

[No. 6565. Decided December 10, 1907.]

CHARLES H. PEARCE, *Respondent*, v. GREEK BOYS' MINING  
COMPANY, *Appellant*.<sup>1</sup>

DISCOVERY—INTERROGATORIES—ANSWERS—SUFFICIENCY. It is not error to deny an application for specific answers to each of 160 interrogatories, where those relating to a single matter were grouped and fully answered by one answer and the defendant was sufficiently informed to prepare its defense.

TRIAL — RECEPTION OF EVIDENCE — OBJECTIONS — WAIVER. Where upon objection to testimony, offer of other proof is made, and the objection is modified in such a way as to lead the court and counsel to believe that the first objection is waived, it cannot be urged as error, although no waiver was intended.

EVIDENCE—DOCUMENTARY—COPIES. A certified copy of a recorded instrument is admissible in evidence as an admission.

MASTER AND SERVANT—EMPLOYMENT—ACTION FOR WAGES—EVIDENCE—ADMISSIBILITY. Upon an issue as to whether plaintiff was employed by, and performed services for the defendant, monthly statements made by plaintiff to defendant of expenses in working a mine, showing services performed and a claim for salary due, are relevant to the issues and admissible in evidence, whether shown to the defendant's board of trustees or not.

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered April 30, 1906, upon the verdict of a jury rendered in favor of the plaintiff, after a trial on the merits, in an action on a contract of employment. Affirmed.

*M. L. Clifford, E. E. Cushman, and R. F. Laffoon*, for appellant.

*G. C. Israel*, for respondent.

FULLERTON, J. — The respondent brought this action against the appellant to recover the sum of \$3,500, claimed to be due for services rendered the appellant in superintending

<sup>1</sup>Reported in 92 Pac. 773.

Dec. 1907]

Opinion Per FULLERTON, J.

the operation of the appellant's mines located at Berner's Bay in the territory of Alaska. The complaint was in the ordinary form, merely alleging the contract of employment, the performance of the services, and the failure of the appellant to pay in accordance with the contract. To the complaint an answer was filed consisting of denials and separate and affirmative defenses, some five in number. At the time the answer was filed and served, the appellant served upon the respondent written interrogatories for the discovery of facts and documents material to its defense, to be answered on oath by the respondent. Later on the respondent filed a reply to the new matter contained in the answer, and also answers to the interrogatories. These answers the appellant deemed insufficient, and moved that they be stricken and further and more complete answers filed. This motion the trial court denied. Thereafter a trial was had on the issues made, before the court and a jury, which resulted in a verdict in favor of the respondent for the sum claimed in his complaint. This appeal is from the judgment entered on the verdict.

It is first assigned that the court erred in refusing to require the respondent to make more complete answers to the interrogatories. There were one hundred and sixty of these interrogatories as the appellant numbered them, and many of them were so compounded as to greatly increase even this considerable number. Many of them bore upon a single issue, and in answering them the respondent grouped those pertaining to one matter and answered the group as if it were but a single interrogatory, without referring to each of them severally. The appellant contends that the court should have required the respondent to answer them *seriatim*, and claims that it has been denied substantial rights in that it was not sufficiently informed of the respondent's contentions as to prepare its defense thereto. But we find nothing in the record that justifies these claims. The answers informed the defendant as to the general nature of the contract, the fact that it

was oral, the name of the officer of the company with whom it was made, and in a general way, what acts he had performed in carrying out its terms. Had he answered each interrogatory separately, he could have said but little more than he did say, and by answering in the manner he did answer he avoided much unnecessary repetition. Moreover, how specifically answers to interrogatories shall be made is largely in the discretion of the trial court, and its rulings made in regard thereto will be reviewed only for manifest abuse, such as where the result of the failure to require specific answers has misled the party proposing them to its prejudice. No such result followed the failure to answer specifically in the present instance, and we find no error in the action of the trial court.

The respondent offered in evidence a certified copy of a financial statement filed by the appellant in the United States District Court of Alaska. This statement was objected to in the court below because not properly certified nor filed in the office in which the laws of Alaska require it to be filed. In this court it is further objected that it was not shown that there was any law of Alaska which required or permitted the filing of such a paper.

When the objection was made in the court below, the respondent's counsel stated that if it was insisted upon he would prove the laws of Alaska relating to the filing of such instruments, stating in the same connection what the statute required in that behalf. The court, also, evidently deeming the statement assented to, restated to the jury the substance of the Alaska statute. Counsel thereupon modified his objection, insisting that a copy was inadmissible for the purposes it was sought to be introduced, namely, as an admission, urging that only the original could be introduced for that purpose. The objection was thereupon overruled and the copy admitted. By this procedure we think counsel waived the first objection and cannot now urge it in this court. It may be

Dec. 1907]

Opinion Per FULLERTON, J.

that he did not so intend. Indeed, we think he did not, but the record to our mind conclusively shows that both the trial judge and the opposing counsel thought it waived; and this being true, the appellant cannot insist upon it here. If a party misleads the court he must abide the result, whether it be done intentionally or unintentionally. As to the objection actually ruled upon, the record presents no error.

The respondent each month, during the term he claims to have been employed by the appellant company, made out and forwarded to the secretary of the company a statement showing the receipts and expenditures of the company in working the mines during the last preceding month. The respondent procured these statements from the company and was allowed to put them in evidence over the objection of the appellant. It is contended that this was error because the statements did not tend to prove any of the issues. The answer not only denied the contract of employment, but it was affirmatively alleged that the respondent never performed any service on behalf of the company. These statements were clearly responsive to these issues. They not only showed services performed for the appellant, but that the appellant was informed each month of the services performed. The fact, also, that the services were performed and accepted by the appellant tended to corroborate the respondent's statement that they were performed under a contract. In the summary to these statements, also, there was a claim of salary due. This was admissible to disprove the contention made by the appellant to the effect that it had no knowledge of any such claim until long after the services were performed. It was not error to refuse to allow the appellant's secretary to testify that these statements had never been shown to the board of trustees. This would not have destroyed their probative effect. They became a part of the records of the company, and it is not the respondent's fault that the trustees did not see them.

Nor did the court err in refusing to instruct a verdict for the appellant. The respondent, by what seems to us to be the

overwhelming weight of the evidence, proved the substance of all of the issues on which he had the affirmative. This, clearly, entitled him to recover.

We have carefully examined the other errors assigned and do not find that they merit special consideration.

The judgment is affirmed.

RUDKIN, MOUNT, and DUNBAR, JJ., concur.

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[No. 7038. Decided December 10, 1907.]

REEVES AYLMORE, *Appellant*, v. THE CITY OF SEATTLE *et al.*,  
*Respondents*.<sup>1</sup>

STATUTES—EMBRACING MORE THAN ONE SUBJECT—MUNICIPAL CORPORATIONS—IMPROVEMENTS. Laws 1905, p. 300, giving additional power to cities with respect to public utilities, does not violate the constitutional prohibition against embracing more than one subject from the fact that it authorizes cities to acquire and conduct distinct public utilities, such as water works, sewerage systems, light and power plants, and railways, which are independent of each other.

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—PROCEEDINGS—BONDS—VALIDITY. Bonds for a municipal water system, authorized at a special election, are invalid where the ordinance proposed for their payment a fund created by seventy-five per cent of the gross revenues of the existing system sufficient to pay accruing interest to January 1, 1909, and thereafter by diverting \$175,000 per annum, exclusive of revenues from water used for municipal purposes, and the proposition submitted to the voters was to pay into the fund \$175,000 out of the gross revenues of the system without any deductions; the statute requiring that the plan for raising revenues be submitted to the voters.

SAME. A statute requiring a "fixed proportion" of the revenues from a water system to be set apart to meet accruing interest and the obligation as it matures, is not complied with by setting aside \$175,000 out of the gross revenues or out of seventy-five per cent of the gross revenues.

<sup>1</sup>Reported in 92 Pac. 932.

Dec. 1907]

Opinion Per Curiam.

**SAME—INJUNCTION AGAINST ISSUANCE OF BONDS—DEFENSES.** It is not an answer to a suit to enjoin the issuance of municipal bonds that the voter is not injured if the city grants less than the vote authorized; since defects or irregularities interfere with an advantageous sale of the bonds.

**SAME—SALE OF BONDS—TIME FOR PAYMENT.** It is not a valid objection to the issuance of municipal bonds that the city agreed with the purchaser that the bonds were not to be paid for until the money was needed in the prosecution of the work contemplated.

Appeal from a judgment of the superior court for King county, Albertson, J., entered September 6, 1907, in favor of the defendants, upon sustaining a demurrer to the complaint, dismissing an action to enjoin an issuance of bonds in aid of a municipal improvement. Reversed.

*Peters & Powell and Ballinger, Ronald, Battle & Tennant,*  
for appellant.

*Scott Calhoun,* for respondents.

**PER CURIAM.**—This action is brought by the appellant, who is a citizen and taxpayer of the city of Seattle, to enjoin a contemplated bond issue by that city. The respondent city challenged the sufficiency of the complaint by a general demurrer, which was sustained by the trial court. The appellant thereupon elected to stand on the complaint, and final judgment of dismissal was entered, from which this appeal is prosecuted.

From the complaint it is gathered that the city of Seattle is the owner of a water system from which the city and its inhabitants are supplied with water. This system has its source of supply in Cedar river, and is conducted from thence to the city by pipes through which the water flows by gravity to reservoirs within the city, from where it is distributed to the users thereof. The city, being desirous of enlarging this supply, proposed to lay additional pipes from the source of supply on Cedar river to the city, and construct new reservoirs, the same when completed to form a part of the existing sys-

tem. The bonds, to enjoin the issuance of which this action is brought, are proposed to be issued to defray the cost of this addition. The bonds are not made a general obligation of the city, but are made a charge upon a certain proportion of the income to be derived from the water system when completed, pursuant to subdivision (b) of § 2 of the act of the legislature of Washington, approved March 11, 1897, and the act amendatory thereof, approved March 8, 1905, (Laws 1897, page 326; 1905, page 300). The objections raised are two: namely: (1) that the act under which the proceedings were had is unconstitutional; and (2) that the proceedings had did not comply with the requirements of the statute.

It is objected to the act in question that it embraces more than one subject, and is thus in violation of § 19, of art. II, of the state constitution. This contention has its foundation in the fact that the act, as amended, authorizes cities and towns to acquire, regulate and conduct several distinct public utilities, between which there is no relation in the sense that one is dependent on the other; that is, the act empowers the city to acquire, maintain and operate water works, a sewerage system, plants for furnishing the city with light and power, cable and electric railways, and certain other enumerated public utilities. It is said that each one of these comprises a separate subject, and that legislative action on them should, to comply with the constitution, be by separate acts, since neither the title to the act nor the act itself indicates any general purpose or subject. But we cannot think this objection well founded. The purpose of the act, while in form independent, was to amend the general law relating to the powers of municipal incorporations; that is, it was intended to confer additional powers upon them. In this sense it embraced but one subject, and this is sufficient to relieve the act from the constitutional prohibition, since the purpose of the constitutional provision is to prevent log-rolling legislation—the insertion in one act of disconnected, unrelated subjects for the purpose of inviting

Dec. 1907]

Opinion Per Curiam.

a combination of interests. While the question seems not to have been before this court in its present form, it has been before it in principle, and was determined contrary to the objection urged. *McMaster v. Advance Thresher Co.*, 10 Wash. 147, 38 Pac. 670; *Johnston v. Wood*, 19 Wash. 441, 53 Pac. 707; *Hathaway v. McDonald*, 27 Wash. 659, 68 Pac. 376; *Seattle v. Barto*, 31 Wash. 141, 71 Pac. 735; *State v. Sharpless*, 31 Wash. 191, 71 Pac. 737, 96 Am. St. 893.

The second objection is of more moment. Section 2 of the act in question provides that, whenever any city or town desires to construct any of the public works described in the first section of the act, it shall provide therefor by ordinance, which ordinance shall specify and adopt the system or plan proposed, and declare the estimated cost thereof, as near as may be, and provide for submitting the same to the qualified voters of the city or town for ratification or rejection at a special election to be called for that purpose; further providing, that, if an indebtedness is to be created by the construction of the proposed public works, such indebtedness and the amount thereof shall likewise be stated in the ordinance, and be likewise submitted to the qualified voters of the city or town for ratification or rejection. Two forms of indebtedness are provided for; the one, a general indebtedness of the city or town, which the city or town stands obligated to pay; the other, an indebtedness against a special fund created out of a "fixed proportion" of the income to be derived from the work authorized when completed, which the city obligates itself to set aside for that purpose, and into which it may, from time to time, by ordinance, transfer any other of its available funds. Bonds or warrants may be issued by the city against either of such funds to the amount of the costs and charges to be met from such fund. Such bonds, however, when issued against the special fund, while declared a valid claim in favor of a holder thereof against the special fund, are especially declared not to constitute an indebtedness of the city or town issuing them.

In its attempt to comply with these provisions of the statute, the city of Seattle adopted an ordinance (No. 14,116), having the following title:

"An Ordinance, proposing to the voters of the city of Seattle that the city of Seattle make certain additions to the existing water works owned and controlled by said city, specifying and adopting the proposed plans and details of said additions, and declaring the estimated cost thereof as near as may be, to be the sum of two million two hundred fifty thousand (\$2,250,000) dollars, and providing for the holding of an election in the city of Seattle, on the 12th day of September, 1906, at which said voters may vote for or against said proposition; also providing for the construction of said additions to the water works in case a majority of the voters of said city voting at said election shall thereby assent to said proposition, and providing for the payment therefor and establishing a fund for such payment by setting aside therefor, during the period of construction of said addition, such an amount from the gross revenue derived from the water works owned and controlled by the said city as shall be necessary to pay interest on all bonds issued prior to the first day of January, 1909, and providing for the payment into said fund, from and after the first day of January, 1909, of the sum of one hundred and seventy-five thousand (\$175,000) dollars per annum, out of seventy-five per cent of the gross revenues derived from the water works owned and controlled by said city (exclusive of revenue from water used for municipal purposes) for the annual payment of interest and the partial payment of the principal, until all of such bonds shall be redeemed."

Section 2 of the body of the ordinance described the plan of the proposed improvement, its estimated cost, and the amounts for which it was proposed to issue bonds. Section 3, provided for the submission of the plan and mode of payment to the qualified voters of the city, and was in the following language:

"A special election shall be held on Wednesday the 12th day of September, A. D. 1906, in the city of Seattle, at which there shall be submitted to the qualified voters of the city of

Dec. 1907]

Opinion Per Curiam.

Seattle, for ratification or rejection, the proposition of the construction of additions to the present Cedar River Water System of the city of Seattle by the acquisition of necessary additional lands or rights of way, the construction of an additional gravity supply main not less than fifty-four (54) inches in diameter, from the present intake of Cedar River to the City of Seattle, and the construction of two additional reservoirs and the connecting of the additional supply main with the present and proposed reservoirs and the connecting of said reservoirs with the present distribution system of the city of Seattle, in accordance with the plan or system set forth in section two of this ordinance, together with the proposition of incurring a special bonded indebtedness bearing interest at a rate not to exceed five per cent per annum in the sum of two million, two hundred and fifty thousand (\$2,250,000) dollars to be an obligation against not to exceed one hundred and seventy-five thousand (\$175,000) dollars per annum, to be set aside from the gross revenue or proceeds to be derived from the water system of the city of Seattle."

Section 5, created the fund out of which payment was to be made, and reads as follows:

"That there be and hereby is created and established a fund to be called 'Cedar River Water Supply Fund, of Seattle, Series Number 2,' into which said fund shall be paid out of seventy-five per cent. of the gross revenues of the water system of the city of Seattle, an amount necessary to pay the interest on each interest bearing date on the bonds issued in compliance with section two (2) of this ordinance until the first day of January, 1909, after which date there shall be paid into such fund out of such receipts (exclusive of revenue from water used for municipal purposes), the sum of one hundred and seventy-five thousand (\$175,000) dollars per annum, which sum shall be applied to the payment of interest and on account of the payment of the principal on said bonds until all of said bonds are redeemed."

The questions submitted to the qualified voters, as stated in the notice, were the following:

"Notice is hereby given that under the provisions of Ordinance No. 14,116 there is submitted to the qualified voters of the city of Seattle for their ratification or rejection, the propo-

sition of the construction of additions to the present Cedar River Water System of the city of Seattle, by the acquisition of an additional gravity supply main, not less than fifty-four (54) inches in diameter, from the present intake on Cedar River to the city of Seattle and the construction of two additional reservoirs and the connecting of the additional supply main with the present and proposed reservoirs and the connecting of the said reservoirs with the present distribution system of the city of Seattle, in accordance with the plan or system set forth in sections one and two of said Ordinance No. 14,116, together with the proposition of incurring a special bonded indebtedness, bearing interest at a rate not to exceed five per cent per annum, in the sum of two million two hundred and fifty thousand (\$2,250,000) dollars, to be an obligation against not to exceed one hundred and seventy-five thousand (\$175,000) dollars per annum to be set aside from the gross revenue or proceeds to be derived from the water system of the city of Seattle."

It is apparent, from a comparison of these several excerpts, that the scheme for creating the fund out of which the bonds were to be paid, as proposed by the ordinance, is not the scheme that was submitted to the voters of the city and by them ratified. The ordinance proposes a fund created by diverting from seventy-five per centum of the gross revenues derived from the existing system sufficient to pay the accruing interest on the bonds until January 1, 1909, and thereafter by diverting from seventy-five per cent of such gross revenues one hundred and seventy-five thousand dollars per annum, exclusive of revenues from water used for municipal purposes. On the other hand, the proposition submitted to the voters was to pay into the fund \$175,000 out of the gross revenue of the system without any deductions whatsoever, either of a percentage of the gross revenues derived from the system, or of revenue derived from water used for municipal purposes. This, it seems to us, was not a compliance with the statute in this respect. Inasmuch as the city was required by the statute to submit to the qualified voters of the city the plan for raising revenues to meet the cost of the system, it must sub-

Dec. 1907]

Opinion Per Curiam.

mit to them the entire plan, in the form it is proposed to put it into effect, as authority to incur the obligation in the form proposed is derived as much from the voter as it is from the ordinances and other proceedings on the part of the city officers.

Furthermore, neither of these plans followed the statute. The requirement of the statute is that a "fixed proportion" of the revenues derived from the system be set apart to meet the accruing interest on the obligation, and the obligation itself as it matures. Seventy-five per cent out of the gross revenues of the system would, of course, be a fixed proportion of such revenues, but \$175,000 out of the gross revenues or out of seventy-five per centum of the gross revenues, is not a fixed proportion of such revenues, but is a varying proportion, being less or more than a fixed proportion of the entire gross revenue as these revenues increase and diminish.

What would be the effect of this departure from the statute were the defendant an innocent purchaser of the bonds, or a person who had paid the city value for them, need not be here considered. This suit was instituted to prevent the issuance of the bonds, and the defect is sufficiently glaring to warrant the court in granting an injunction. We have not overlooked the argument that the voter is not injured if the city grants less than the vote authorizes, but we think that argument not sound. The injury lies in the fact that such defects and irregularities frighten away the prudent, cautious person who is seeking a safe and permanent investment, and who would be inclined to take the bonds on low rates—leaving the field entirely to those of a speculative turn who are willing to take increased risks for the sake of increased gains. Both the city and the voter are injured when the proceedings leading up to the issuance of the bonds are so defective as to give rise to these conditions.

It was competent for the city to make an agreement with the contemplated purchaser of the bonds as to the time of

payment, and it is no objection to their issuance that the bonds were not to be paid for until the money was actually needed by the city in the prosecution of the contemplated work. For the defect noted, however, the judgment appealed from is reversed, and the cause remanded with instructions to reinstate the case and overrule the demurrer.

Roor, J., dissents.

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[No. 6716. Decided December 10, 1907.]

J. ERNEST DAVIS *et al.*, *Respondents*, v. NORTHWESTERN  
MUTUAL FIRE ASSOCIATION, *Appellant*.<sup>1</sup>

INSURANCE—PROOFS OF LOSS—NECESSITY. It is a condition precedent to an action on a fire insurance policy that proofs of loss be furnished within the time required by the policy, where the insured was not misled in any way; and a statement by an agent that he was not in a position to arbitrate, and neither admitted nor denied anything, cannot be said to mislead the insured.

APPEAL—DECISION—PLEADINGS—AMENDMENT ON REVERSAL. In an action on an insurance policy, where it appeared that the proofs of loss were not furnished in time and that defendant relied upon such fact for a defense, and no evidence of any waiver was offered, an application by plaintiffs to amend their complaint to show a waiver, made upon reversal of a judgment in their favor, comes too late.

Appeal from a judgment of the superior court for King county, Albertson, J., entered October 30, 1906, upon the verdict of a jury rendered in favor of the plaintiffs, in an action upon a policy of fire insurance. Reversed.

*Shank & Smith*, for appellant.

*Blaine, Tucker & Hyland*, for respondents.

MOUNT, J.—This action was brought by respondents to recover a loss upon a fire insurance policy issued by the appellant. The complaint alleges that on August 18, 1905, a policy of fire insurance was issued by appellant to the respondents, insuring a barn and contents against loss by fire

<sup>1</sup>Reported in 92 Pac. 881.

for a period of ninety days; that the amount of insurance upon the barn was \$1,000, and upon the contents \$1,700; that on September 30, 1905, the barn and contents burned and were a total loss, and that the reasonable value thereof was \$5,440. The complaint further alleged that on February 8, 1906, proofs of loss were made. These proofs of loss were made a little more than four months after the fire occurred. No excuse for the delay is set out in the complaint. The complaint contains a copy of the policy, which provides that proofs of loss must be made to the company "within sixty days after the fire unless such time is extended in writing by this company," and also, "no suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the assured with all the foregoing agreement or unless commenced within twelve months next after the fire."

The appellant, by answer, put in issue certain material allegations of the complaint and alleged two affirmative defenses: First, that in the written application made by respondents for the insurance they certified that the cost of the barn was \$2,200, and that the cash value thereof at that time was \$1,600; that appellant relied upon these statements when it issued the policy; that in truth and in fact the cost of the barn did not exceed \$1,000, and the value thereof at the time of the application did not exceed that sum, and but for these false representations the policy would not have been issued. Second, that in making proofs of loss the respondents falsely made oath that the value of the barn at the time of the fire was \$2,000; that this oath was made with intent to deceive and defraud the appellant. These allegations of the affirmative defenses were put in issue by reply. When the cause came on for trial, the defendant demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. This demurrer was overruled. After the jury had been impaneled, objection was made to the introduction of evidence upon the same ground. Again, at the close

of respondents' case and also after all the evidence had been submitted on both sides, motions were made by appellant for nonsuit, upon the ground that no proofs of loss were made within sixty days and no waiver or excuse proven therefor. All the objections and motions were denied by the court. The trial resulted in verdict and judgment in favor of the respondents for \$2,150. The appeal is prosecuted from that judgment.

Several errors are assigned, but our conclusion upon the question of the failure to file proofs of loss within the time designated by the policy obviates the necessity of noticing other points. This question was presented to this court and decided in the case of *Davis v. Pioneer Mut. Ins. Ass'n*, 44 Wash. 532, 87 Pac. 829. We there said:

"The provision as to time fixed by the policy was a reasonable one, and should have been met by appellant, unless he showed circumstances which in reason should have excused the delay. All the circumstances show that the delay was due to his wilful refusal to comply with the policy requirements, and with respondent's demand. The policy provides that no suit shall be maintained thereon until the insured has complied with its requirements. It therefore became a condition precedent to maintain the suit that the kind of proof called for should be made, and should be made within sixty days unless the time should be extended in writing by respondent, which was not done and was not requested. Appellant failed in both particulars and he should not now be permitted to maintain his suit in plain violation of the terms of his policy."

The case of *Davis v. Pioneer Mut. Ins. Ass'n*, *supra*, was not decided when this case was on trial in the court below. Respondents upon this appeal seek to distinguish the *Davis* case from this one because the insured in that case was formerly an insurance agent, while in this case the insured were farmers. We there said:

"A different question might arise if an ordinary layman, unacquainted with insurance methods and who had in some manner been misled by the insurer, were seeking relief."

It is true that the insured in this case were farmers. But this fact alone is not sufficient to base a distinction upon. There is nothing in the record or evidence before us even tending to show that the respondents were misled in any way. On the other hand, one of the respondents testified that he went to the principal office of appellant in Seattle, on October 16 or 18, 1905, which was the month succeeding the fire, and was then told by an officer of the company: "I am not in a position. I will not arbitrate with you. I am not in a position. We neither admit nor deny anything," and he refused to discuss the matter of arbitration with the insured. This indicated very clearly that the appellant proposed to stand upon the terms of the policy and waive nothing. It cannot be said that appellant by this misled the respondents, and we think the rule must apply in this case.

Respondents further contend that the rule laid down in *Davis v. Pioneer Mut. Ins. Ass'n*, *supra*, is not in accord with the weight of authority upon the subject. We are therefore requested to overrule that case. It is true that the states of Michigan, Wisconsin, Kansas, Kentucky, Florida, Virginia, and possibly other states, have held that where the insured fails to furnish proofs of loss under policies similar to the one in this case within the time specified, he can still recover provided proofs were made before suit is brought, as shown by the following cases: *Steele v. German Ins. Co.*, 93 Mich. 81, 53 N. W. 514, 18 L. R. A. 85; *Flatley v. Phoenix Ins. Co.*, 95 Wis. 618, 70 N. Y. 828; *St. Paul Fire etc. Ins. Co. v. Owens*, 69 Kan. 602, 77 Pac. 544; *Gragg v. Home Ins. Co.*, 28 Ky. Law 988, 90 S. W. 1045; *Hartford Fire Ins. Co. v. Redding*, 47 Fla. 228, 37 South. 62, 110 Am. St. 118; *Northern Assur. Co. v. Hanna*, 60 Neb. 29, 82 N. W. 97; *North British etc. Ins. Co. v. Edmundson*, 104 Va. 486, 52 S. E. 350.

On the other hand, the states of New York, Ohio, Illinois, Minnesota, Maryland, Indiana, California, Missouri, Arkansas, and possibly other states, and some of the Federal courts,

have held to the rule followed by us in the case of *Davis v. Pioneer Mut. Ins. Ass'n*, *supra*, as shown by the following cases: *Quinlan v. Providence etc. Ins. Co.*, 133 N. Y. 356, 31 N. E. 31, 28 Am. St. 645; *Shapiro v. Western Home Ins. Co.*, 51 Minn. 239, 53 N. W. 463; *Farmers' Ins. Co. v. Frick*, 29 Ohio St. 466; *Scammon v. Germania Ins. Co.*, 101 Ill. 621; *Leftwich v. Royal Ins. Co.*, 91 Md. 596, 46 Atl. 1010; *Hanover Fire Ins. Co. v. Johnson*, 26 Ind. App. 122, 57 N. E. 277; *White v. Home Mut. Ins. Co.*, 128 Cal. 131, 60 Pac. 666; *Burnham v. Royal Ins. Co.*, 75 Mo. App. 394; *Teutonia Ins. Co. v. Johnson*, 72 Ark. 484, 82 S. W. 840; *Missouri Pac. R. Co. v. Western Assur. Co.*, 129 Fed. 610. We are satisfied with the reasons supporting the rule as stated in these cases last above cited, and therefore decline to reverse our holding in the *Davis* case.

Respondents request that, if we reverse the judgment on the ground that the proofs of loss were not filed in time, we give them an opportunity to amend by alleging waiver on the part of appellant. We think the request comes too late at this time, especially in view of the fact that respondents had an opportunity at the trial to prove a waiver if there was one, and submitted no evidence tending in the least to show a waiver, but on the contrary the evidence of the respondents, as hereinbefore stated, shows that there was no waiver, but that the appellant stood upon its strict rights under the contract, and in view of the further fact that the appellant contended from the beginning at every opportunity, that it was necessary to make the proofs of loss as provided in the policy, and that this was one of the defenses upon which it relied. Respondents therefore had ample notice of appellant's position. If evidence had been introduced sufficient to go to the jury upon the question of waiver, we should now consider the complaint amended in that respect. But it seems to us to be unfair to grant a new trial to respondents after they have had one trial in which all the facts might have been shown, and very

Dec. 1907]

Statement of Case.

likely were shown, and in which trial the case might have been finally concluded, and now require the appellant, who has been successful on this appeal, to submit to another trial. This would permit respondents to try their case on one theory, and if not successful on that theory, to try it over on another theory. There must be an end of litigation somewhere. We must decline to permit an amendment at this time under these circumstances.

The judgment will therefore be reversed, and the cause ordered dismissed.

HADLEY, C. J., CROW, and ROOT, JJ., concur.

FULLERTON and RUDKIN, JJ., took no part.

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[No. 6936. Decided December 10, 1907.]

GEORGE PEYSER, *Respondent*, v. WESTERN DRY GOODS  
COMPANY, *Appellant*.<sup>1</sup>

CONTRACTS—CONSTRUCTION—TRIAL—QUESTION OF LAW—EMPLOYMENT OF AGENT. The construction of a contract of employment is for the court, and it is error to submit it to the jury, where a written contract provided for a salary based on five per cent commission on sales made and allowed the agent to draw \$75 a month "on account," and the undisputed oral evidence, received without objection, showed that the parties had agreed that the agent was guaranteed \$75 per month and expenses to be advanced monthly, and if sales on a basis of five per cent commission amounted to more than the advances, he was to be paid the same at the end of the season; and in such case the agent was not to receive his expenses and \$75 in addition to the commissions.

Appeal from a judgment of the superior court for King county, Frater, J., entered May 8, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action to recover an agent's commissions. Reversed.

B. B. Crawford, for appellant.

E. P. Dole and J. E. McGrew, for respondent.

<sup>1</sup>Reported in 92 Pac. 886.

MOUNT, J.—The respondent brought this action in the court below to recover a balance alleged to be due upon a contract. The complaint alleged:

“That early in August, 1906, the plaintiff contracted and agreed with defendant to enter the defendant’s service and employment and to sell goods and merchandise for the defendant as a traveling salesman in Eastern Washington, for the following compensation, to wit: A commission of five per cent on the goods and merchandise to be sold by the plaintiff as aforesaid, and also his reasonable traveling expenses in the premises, the plaintiff being at liberty from the beginning to draw \$75 per month on account of commissions;”

that the employment extended to December 12, 1906, during which time plaintiff sold goods to the amount of \$25,941.30, and thereby earned commissions amounting to \$1,296.06; that plaintiff’s traveling expenses amounted to \$1,015.59, the total being \$2,311.65; that defendant had paid plaintiff sums aggregating \$1,113.41, leaving a balance due plaintiff of \$1,199.24. At the trial it was conceded that the traveling expenses of the plaintiff amounted to \$661.90, and that the amount of \$1,015.59, as alleged in the complaint, was an error. The answer denied the contract and amount of sales as stated in the complaint, and alleged in substance that the defendant employed the plaintiff at a salary based on five per cent of all orders secured by the plaintiff, which orders were accepted and goods shipped by defendant, plaintiff being allowed “a drawing account of \$75 per month and reasonable traveling expenses;” that plaintiff had sold goods amounting to \$18,658.97 and no more, and had been paid by defendant \$89.11 in excess of the amount due him. The answer prayed for a judgment against the plaintiff in the sum of \$89.11. Upon these issues the cause was tried to the court and a jury. A verdict was returned in favor of the plaintiff for \$725. From a judgment entered on the verdict, the defendant appeals.

Dec. 1907]

Opinion Per MOUNT, J.

At the trial it was agreed that the contract of employment was made by a letter written by defendant in Seattle to the plaintiff in San Francisco, on July 3, 1906, as follows:

"We have your letter of the 27th ult. and in reply will say that it is Eastern Washington that we want a man to travel, with headquarters at either Spokane or Wenatchee. This job is open at the present time, and the salary will be based on five per cent commission of the sales, allowing the man to draw \$75 per month on account. The young man that worked this territory for the past nine months sold \$42,285.89 and he had no experience on the road, nor did he know the dry-goods business. We think that it will be a good territory for a man who has had experience. Should you care to take this matter up, kindly let us know at once, as the young man is very anxious to make a trip to Alaska but will not leave until we secure another man."

This offer was accepted by the plaintiff by a letter in which he stated in substance, "I accept your offer," and he reported to defendant for work on the first Tuesday or Wednesday in August, 1906. Plaintiff testified that at that time he had a conversation with Mr. Gwinn, manager of defendant company, as follows:

"So I came in and he says, 'Have you got that contract I sent you in 'Frisco?' and I says, 'No, sir, I haven't got that contract.' He says, 'Are you ready to start in,' and I said, 'Yes,' and he says, 'Now you know, Mr. Peyser, your salary is five per cent commission on your sales and we allow you to draw \$75 a month on account,' and he takes one of these small books . . . he says, 'Now, Mr. Peyser, we pay your expenses every week. We furnish you with these books and at the end of the week you send the book in and the day we receive the book we mail you a check for expenses the following week.'"

Mr. Gwinn for the defendant testified in substance the same as the plaintiff as to what the conversation was after the written proposal had been accepted. He said:

"Mr. Peyser came up in answer to my letter and came down to the store and I told him about the matter . . . and

he asked something about salary. I told him it was based on a five per cent commission with a drawing account of \$75 a month and necessary expenses. Mr. Peyser did not understand and asked me to explain the drawing account. I explained to Mr. Peyser that we guaranteed him \$75 and necessary expenses. If his sales on a basis of five per cent commission amounted to more than that, we would pay him at the end of the season. In our business we call a season six months. . . . In other words, we guarantee you \$75 a month and expenses regardless of your sales. If your sales at five per cent commission amount to more, we pay you."

This is substantially all the evidence as to what the terms of the contract were. This oral evidence went in on both sides without objection.

If the written contract was not clear or was ambiguous in any respect, it was because of the use of the words "on account." The letter quoted said nothing about expenses. Under the letter and its acceptance the respondent clearly agreed to sell goods at a commission of five per cent upon the amount of his sales, against which he could draw \$75 per month. If this had been the whole contract, the meaning of the words "on account" was clear to the effect that he could draw \$75 per month against his five per cent commissions, and no more until final settlement. But the item of expenses introduced a new element into the contract. This item was discussed and agreed upon before the respondent entered upon his work, and it is clear from the oral evidence that the appellant agreed to advance the expenses of respondent in addition to the \$75 per month, and that the contract, as shown both by the written and the undisputed evidence, was that the respondent agreed to sell the goods at five per cent commission, and was guaranteed his expenses and \$75 per month regardless of the amount of sales. If his sales amounted to more than his expenses and \$75 per month advance, he was entitled to that difference upon settlement. There was substantially no dispute as to the terms of the contract in regard to the compensation. The respondent's evidence, while not as clear as that

Dec. 1907]

Opinion Per MOUNT, J.

of Mr. Gwinn upon the subject, shows that both his expenses and \$75 per month were to be drawn against his five per cent commission, and on account thereof. It was therefore the duty of the court to instruct the jury what the contract was in that respect. The court, instead of doing so, submitted this question to the jury, and requested them to determine what the contract was, and in that connection instructed the jury as follows:

"I instruct you further, gentlemen, if you find from the evidence submitted to you in this case that the Western Dry Goods Company agreed to pay George Peyser a salary based upon five per cent commission upon all goods sold by Peyser and shipped by said company upon his orders, and that said company was to allow the said Peyser a drawing account of \$75 per month and traveling expenses guaranteed, then in that event your verdict should be in favor of the defendant Western Dry Goods Company, and against the plaintiff George Peyser, if it should appear by a preponderance of all the evidence in behalf of the defendant that the defendant has paid the plaintiff all the traveling expenses and \$75 per month for all the time he has been actually engaged in the defendant's employ and five per cent on all sales made by the plaintiff."

This instruction was clearly error, because it cannot be maintained under the facts that respondent was entitled to five per cent on all sales and his traveling expenses, and also \$75 per month. Counsel conceded on the oral argument in this court that respondent does not claim \$75 per month in addition to the five per cent commission and expenses, but sought to avoid the error of the trial court by saying that the instructions construed as a whole make it clear to the jury that the \$75 per month was not claimed; but no part of the instructions was pointed out to us wherein the error was rectified, and we fail to find it in the instructions. Following the instruction above quoted, the court said to the jury:

"You are further instructed that the principal question in this case is whether the agreement between the plaintiff and defendant was to pay the traveling expenses of the plaintiff

in addition to the salary based on a five per cent commission of all goods sold."

But this instruction did not in the least modify the previous error, for no reference is there made to the \$75 per month. The question submitted to the jury by this instruction was one for the court, as above discussed, and not for the jury. The only questions which should have been submitted to the jury under the pleadings and admitted facts were, first, the amount of sales upon which respondent was entitled to a commission of five per cent, and second, the amount of the payments, viz., salary and expenses. If the former was greater than the latter, respondent was entitled to a verdict for the difference. Otherwise a verdict should go for the defendant.

The judgment must be reversed, and the cause remanded for a new trial in accordance with this opinion.

RUDKIN, DUNBAR, ROOT, and FULLERTON, JJ., concur.

HADLEY, C. J. and CROW, J., took no part.

[No. 6750. Decided December 10, 1907.]

**BARNARD BRIGHT, *Respondent*, v. HANOVER FIRE INSURANCE  
COMPANY, *Appellant*.<sup>1</sup>**

**EVIDENCE—PAROL—TO VARY WRITING.** A stranger to a written contract, cannot, in a controversy with one of the parties thereto, object to oral evidence on the ground that it contradicts the terms of the writing.

**APPEAL — RESERVATION OF GROUNDS — OBJECTIONS TO EVIDENCE.** Error in the admission of evidence cannot be urged on appeal, where only one objection to that character of evidence was made and the objection was not ruled upon nor the question answered.

**INSURANCE—INSURABLE INTEREST—PROPERTY UNDER CONTRACT OF SALE—ESCROWS—PROOF OF SPECIAL INTEREST.** Where, pending a purchase of personal property, the conveyance was placed in escrow, and the condition for delivery was not complied with at the time of

<sup>1</sup>Reported in 92 Pac. 779.

Dec. 1907]

Opinion Per RUDKIN, J.

a loss by fire, the general property remains in the vendor, and the vendee, although in possession, cannot recover on a policy of fire insurance taken out by him, in the absence of proof of the value of his special interest in the property; personal property not being within the provisions of the valued policy law.

**SAME—VALUED POLICY LAW.** The valued policy law (Laws 1899, p. 332), applies to a policy of fire insurance taken out by a vendee having a special interest in hotel property (real estate), by reason of a conveyance in escrow, the conditions for delivery of which were not performed at the time of the loss; and thereunder the amount of insurance written in the policy is conclusively taken as the true value of the insured's special interest.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered December 21, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on a policy of fire insurance. Modified.

*Granger & Magill*, for appellant.

*Bostwick & Mulvihill*, for respondent.

**RUDKIN, J.**—On the 30th day of December, 1905, O. L. Allen was the owner of a certain hotel building at Arlington, in Snohomish county, together with the furniture and fixtures therein situated. On the above date he entered into a contract with the plaintiff Bright, whereby he executed and placed in escrow a deed and bill of sale conveying and transferring the hotel building and personal property to the plaintiff. The escrow agreement provided that Allen should remove certain clouds and encumbrances against the property on or before March 15, 1906; that the plaintiff should deposit in escrow a conveyance of certain property owned by him, together with a release of a mortgage against it, and that, if Allen should fail for any reason to comply with the terms of the escrow agreement, the respective deeds should be returned and the agreement to convey should thereupon terminate and be at an end. On the 8th day of January, 1906, the plaintiff entered into possession of the hotel property under an oral

agreement with his vendor, and placed therein personal property of his own of the value of \$290.92. On the 18th day of January, 1906, the defendant company executed and delivered to the plaintiff its policy of insurance, covering \$1,100 on the hotel building; \$337.50 on the furniture and fixtures; and \$62.50 on the bar and bar fixtures. On the 19th day of February, 1906, the hotel building and furniture were totally destroyed by fire, and the present action was instituted to recover the amount of the insurance. From a judgment in favor of the plaintiff for the full amount claimed, the present appeal is prosecuted.

Numerous errors are assigned in the appellant's brief, but the assignments have all been discussed under three general heads, and we will pursue the same course. It is first contended that the court erred in permitting the respondent to prove that he entered into possession of the hotel property under an oral agreement with his vendor, because such testimony tended to vary and contradict the terms of the escrow agreement. We deem it unnecessary to determine whether the testimony offered did in fact vary or contradict the terms of the escrow agreement, for the appellant here was not a party to that agreement, and in such cases the rule now invoked by it has no application.

"The rule excluding parol evidence to vary or contradict a written instrument applies only in controversies between the parties to the instrument and those claiming under them. It had no application in controversies between a party to the instrument on the one hand and a stranger to it on the other, for the stranger not having assented to the contract is not bound by it, and is therefore at liberty when his rights are concerned to show that the written instrument does not express the full or true character of the transaction. And where a stranger to the instrument is thus free to vary or contradict it by parol evidence his adversary, although a party to the instrument, must be equally free to do so. This has been held to be true in the case of writings of all kinds, as for example, deeds, mortgages, leases, bills of sale, licenses,

Dec. 1907]

Opinion Per RUDKIN, J.

insurance policies, and contractual receipts. And even a judicial record is not conclusive upon persons not parties or privies to the action or proceeding." 17 Cyc. 749.

It is next contended that the court erred in permitting the respondent to prove that the appellant's agent had actual notice of the nature of the respondent's claim or title to the hotel building and contents at the time the policy in suit was issued. The record before us does not present this question. Only one objection to this character of testimony was interposed by the appellant. That objection was not ruled upon, and the question to which the objection was interposed was never answered. We cannot, therefore, consider this assignment.

It is next contended that inasmuch as the deed and bill of sale to the hotel property and contents were in escrow, and the condition upon which they were to be delivered over uncomplished with, at the time of the destruction of the property by fire, the general property in the hotel and contents was in Allen at the time of its destruction, and the consequent loss fell upon him and not upon the respondent. This contention must be upheld. *Kinney v. Hickox*, 24 Neb. 167, 38 N. W. 816; *Phoenix Ins. Co. v. Kerr*, 129 Fed. 725; *Phinizy v. Guernsey*, 111 Ga. 346, 36 S. E. 796.

Based on this last contention, the appellant further contends that though the respondent may have had an insurable interest in the property by reason of his possession, yet the recovery must be limited to the value of that interest, and, inasmuch as the value of his special interest was not proved, no recovery can be had except for the value of the personal property of which he was the unqualified owner. This contention must likewise be upheld, unless the respondent is entitled to recover under the provisions of the valued policy law of this state. Laws 1899, page 332. Section 2 of that act, so far as material here, provides as follows:

"Whenever any policy of insurance shall be hereafter written or renewed insuring real property, or any building or

structure erected thereon or connected therewith, and the property insured shall be wholly destroyed without criminal fault on the part of the insured, or his assigns, the amount of insurance written in such policy shall be taken conclusively to be the true value of the property when insured, and the true amount of the loss and measure of damages when destroyed."

The appellant contends that this section does not apply where the interest of the insured is a limited or qualified one, such as that of a tenant, a purchaser in possession, etc., but with this contention we are unable to agree. The valued policy law is founded on what the legislature regarded as sound public policy, and was no doubt intended to relieve the insured from the burden of proving the value of his property after its total destruction, and to prevent insurance companies from receiving premiums on overvaluations and thereafter repudiating their contracts as soon as it becomes to their interest to do so. The law in terms applies to insurance on real property or any building or structure erected thereon or connected therewith, and the insurance now under consideration, in so far as it affects the hotel building, is of that class.

In *King v. Phoenix Ins. Co.*, 195 Mo. 290, 92 S. W. 892, 113 Am. St. 678, a contractor took out insurance in the sum of \$750 on a church building in course of construction or repair. The building was destroyed by fire, and in an action on the policy the company offered to prove that the plaintiff's interest in the property at the time of its destruction was \$108 only. The testimony was excluded, and the judgment was affirmed on appeal, the court holding that the case was controlled by the provision of the valued policy law of that state which does not differ materially from our own. In *Oshkosh Gas-Light Co. v. Germania Fire Ins. Co.*, 71 Wis. 454, 37 N. W. 819, 5 Am. St. 233; *Queen Ins. Co. v. Jefferson Ice Co.*, 64 Tex. 578; *Havens v. Germania Fire Ins. Co.*, 123 Mo. 403, 27 S. W. 718, 45 Am. St. 570, 26 L. R. A. 107, and numerous other cases that might be cited, the courts hold that

Dec. 1907]

Opinion Per RUDKIN, J.

the valued policy law applies in cases of concurrent insurance, and we perceive no sound reason for holding that the act does not apply to insurance on special or limited interests in real property; on the contrary, we think the plain reason and policy of the law require us to hold otherwise. It is doubtless true, as contended by the appellant, that the aggregate insurance on the several parts may exceed the value of the whole, but so may a single policy, and so may concurrent policies. To a certain extent the law undoubtedly gives legal sanction to wagering contracts, but the policy of such a law is for the legislature and not for the courts. The valued policy law, however, does not apply to the insurance on the personal property contained in the hotel, and inasmuch as the respondent was not the owner thereof, at the time of its destruction, and the value of his special interest therein, if any, was not shown, the recovery must be limited to the insurance on the hotel building and the \$290.92 on the personal property owned by the respondent. *Tabbut v. American Ins. Co.*, 185 Mass. 419, 70 N. E. 430, 102 Am. St. 353; *Davis v. Phoenix Ins. Co.*, 111 Cal. 409, 43 Pac. 1115.

The judgment of the court below is therefore modified by limiting respondent's recovery to the sum of \$1,390.92, with legal interest from February 19, 1906, and as thus modified the judgment is affirmed. The appellant will recover its costs in this court.

FULLERTON, MOUNT, and DUNBAR, JJ., concur.

HADLEY, C. J. and CROW, J., took no part.

[No. 7089. Decided December 10, 1907.]

JAMES P. AGNEW, *Plaintiff*, v. BARTO & SON'S BANK,  
*Appellant*, and W. H. BORROW, *Respondent*.<sup>1</sup>

APPEAL — DECISIONS REVIEWABLE — AMOUNT IN CONTROVERSY —  
EQUITABLE ACTIONS — INTERPLEADER. An action of interpleader, under  
Bal. Code, § 4843, wherein the county auditor deposited a warrant in  
court and asked that the conflicting claims of the defendants thereto  
be determined, is of equitable cognizance, and appeal lies to the su-  
preme court regardless of the amount in controversy.

Appeal from a judgment of the superior court for King  
county, Albertson, J., entered November 4, 1907, upon sus-  
taining a demurrer to the cross-complaint, determining the  
rights of conflicting claimants to a warrant, in an action of  
interpleader. Motion to dismiss denied.

*Kenneth Mackintosh* and *Ernest B. Herald*, for plaintiff.

*Blaine, Tucker & Hyland*, for appellant.

*Herbert E. Snook*, for respondent.

RUDKIN, J.—On the 22d day of June, 1907, the defendant  
Borrow assigned to the defendant Barto & Son's Bank his  
claim against King county "for services furnished the As-  
sessor's Department during the month of June, 1907," and  
authorized the bank to receive and receipt for any warrant or  
warrants issued in payment for such services, and to endorse  
the same. On the 17th day of July, 1907, the plaintiff in  
this action, as county auditor, issued his warrant in the sum  
of \$175 in favor of the defendant Borrow, in payment for  
said services. The defendant Borrow thereafter repudiated  
his assignment to the bank, and each of the defendants as-  
serted a claim to the warrant in the official custody of the  
plaintiff as county auditor. The plaintiff thereupon deposited  
the warrant with the clerk of the superior court and com-

<sup>1</sup>Reported in 92 Pac. 885.

Dec. 1907]

Opinion Per RUDKIN, J.

menced an action against both claimants, asking that their rights, claims and interest in the warrant be adjudged, determined and adjusted in such action. The defendant bank filed its answer and cross-complaint, setting forth its right and title to the warrant under the assignment from the defendant Borrow, and prayed judgment against the warrant or fund in court. To this cross-complaint the defendant Borrow demurred, and the demurrer was sustained. The bank refused to plead further, and judgment was entered dismissing the cross-complaint and directing the clerk of the court to deliver the warrant in the registry of the court to the defendant Borrow. From this judgment the bank has appealed.

The respondent Borrow now moves to dismiss the appeal for the reason that the amount in controversy is not sufficient to confer jurisdiction on this court. If this is a civil action at law for the recovery of money or personal property the motion must prevail. Constitution, art. 4, § 4. But if it is a cause of equitable cognizance the motion should be denied. *Fox v. Nachtsheim*, 3 Wash. 684, 29 Pac. 140; *Trumbull v. Jefferson Co.*, 37 Wash. 604, 79 Pac. 1105; *Horrell v. California etc. Ass'n*, 40 Wash. 531, 82 Pac. 889.

The original complaint was filed under Bal. Code, § 4843 (P. C. § 582), which provides as follows:

“Any one having in his possession, or under his control, any property or money, or being indebted, where more than one person claims to be the owner of, entitled to, interested in, or to have a lien on such property, money or indebtedness, or any part thereof, may commence an action in the superior court against all or any of such persons, and have their rights, claims, interest, or liens adjudged, determined, and adjusted in such action.”

When the plaintiff in such an action deposits the money or fund in court, disclaims any interest therein, and is discharged from further liability on account thereof, it would seem on principle that the nature of the action between the adverse claimants should be determined by the nature of the claim

asserted against the property or fund. If such claim is purely legal, it would seem that the issues should be triable by jury, and if equitable by the court. The authorities, however, adopt the view that proceedings of this nature, though authorized by statute, are equitable in their inception and remain so throughout. Thus in *Clark v. Mosher*, 107 N. Y. 118, 14 N. E. 96, 1 Am. St. 798, the court of appeals of that state, in discussing the nature of such a proceeding, says:

"We are of opinion that the trial judge was right in holding, as claimed by the defendant, that the action was of an equitable nature and triable by the court. The plaintiff had no right of action at law against the defendant, and did not seek to recover any money from him. The money in controversy was in court, having been paid into court by a third party, the Phoenix Mutual Life Insurance Company, under an order made on the application of that company pursuant to section 820 of the Code. The plaintiff had brought an action at law against the company upon a policy of insurance and the company, admitting its liabilities on the policy, set up that the defendant's intestate also claimed the amount of the policy, and by this proceeding in the nature of a bill of interpleader, on payment of the fund into court, the plaintiff was required to substitute the defendant's intestate as defendant, and the object of this action was to determine the conflicting claims of the plaintiff and the defendant to the fund in court. Neither party had any right of action at law against the other, but by this equitable proceeding, authorized by the Code, the Insurance Company, against whom both claimed a legal cause of action, was discharged, and they were brought together to litigate the question which of them had the better right to the fund in controversy. No right of trial by jury ever existed in such a case."

For the reasons stated in the foregoing opinion, this cause is of equitable cognizance, and the motion to dismiss is accordingly denied.

HADLEY, C. J., FULLERTON, CROW, and MOUNT, JJ., concur.

DUNBAR and ROOT, JJ., took no part.

Dec. 1907]

Statement of Case.

[No. 6931. Decided December 11, 1907.]

THE STATE OF WASHINGTON, *Respondent*, v. ROBERT  
MERCHANT, *Appellant*.<sup>1</sup>

STATUTES—TITLES AND SUBJECTS. The failure of the title of an act to indicate that the act carries a penalty for violation of its provisions, does not necessarily invalidate the act as containing more than one subject not expressed in the title.

SAME—SUFFICIENCY OF TITLE—CORPORATIONS—OFFICERS—LIABILITY. The title of an act limited to the protection of "stockholders or other persons dealing with the corporation," is not sufficiently broad to include provisions making it a penal offense to issue false statements to persons "dealing with the stock of the corporation," and the act is void as to such provisions, although valid as to its provisions relating to dealings with the corporation, and is not restricted to dealings with "stockholders" only.

CORPORATIONS—OFFICERS — CRIMINAL LIABILITY — INFORMATION — DUPLICITY. An information alleging the violating of a statute as to dealings with "the corporation and its stock," which statute was valid as to dealings with the corporation, but void as to dealings with its stock, is not duplicitous, since it alleges the dealings with the corporation, and the allegations as to dealings with the stock charges no crime and is immaterial.

SAME—EVIDENCE—CRIMINAL LAW—TRIAL. Under such an information, it is error, upon evidence that the prosecuting witness bought stock in the corporation and arranged to take charge of one of its offices, to submit the case to the jury on the theory that the defendant would be guilty by reason of the dealings with the stock as well as by reason of the dealings with the corporation.

SAME—EVIDENCE—BEST EVIDENCE—CORPORATE CAPACITY. Upon a prosecution for the violation of a statute relating to dealings with a corporation, it is error to admit, over the defendant's objection, oral evidence of the incorporation of the company.

CRIMINAL LAW—TRIAL—RIGHT TO JOINT TRIAL. One jointly indicted has no right to demand that he be jointly tried with his co-defendant, especially where it appears that he was the only real party defendant.

Appeal from a judgment of the superior court for King county, Morris, J., entered April 22, 1907, after a trial and

<sup>1</sup>Reported in 92 Pac. 890.

conviction of the violation of a statute relating to corporations. Reversed.

*Fred H. Lysons*, for appellant.

*Kenneth Mackintosh* and *George F. Vanderveer*, for respondent.

HADLEY, C. J.—In this action the state instituted a prosecution against the defendant Merchant, under and by virtue of a statute passed in 1903, the act being found in chapter 93, page 141, Laws of 1903. The act consists of but one section and is as follows:

“Any superintendent, director, secretary, manager, agent, or other officer of any corporation formed or existing under the laws of this state, or transacting business in this state, or any person pretending or holding himself out as such superintendent, director, secretary, manager, agent, or other officer, who shall wilfully subscribe, sign, indorse, verify, or otherwise assent to the publication, either generally or privately, to the stockholders or to other persons dealing with such corporation, or its stock, any wilfully untrue or wilfully and fraudulently exaggerated report, prospectus, account, statement of operations, values, business profits, expenditures, or prospects, or other paper or document intended to produce or give, or having a tendency to produce or give, to the shares of stock in such corporation a greater value than they really possess, or with the intention of defrauding any particular person or persons, or the public or persons generally, shall be deemed guilty of an offense against the laws of the state of Washington, and, upon conviction thereof, shall be punished by imprisonment in the penitentiary, not less than one nor more than five years, or in the county jail not more than one year, or by a fine not exceeding two thousand dollars or by both.”

By information the said defendant was charged, jointly with another, with having violated the terms of the statute in that, as secretary and director of the National Brokerage Company, a corporation, he did “wilfully, unlawfully, and feloniously subscribe, sign and publish to one Alfred B. Adams,

Dec. 1907]

Opinion Per HADLEY, C. J.

a person then and there dealing with said corporation and its stock, a certain wilfully untrue and wilfully and fraudulently exaggerated report, account, or statement of operations, values, and business profits of said corporation, the same being a paper or document intended to produce and give, and having a tendency to produce and give, to the shares of stock in said corporation a greater value than they really possessed, and with the intention of defrauding said Alfred B. Adams." A copy of the said statement is set forth in the information. The defendant demurred to the information, and the demurrer was overruled. A plea of not guilty was then entered by him, and he was tried separately before a jury. A verdict was returned, finding him guilty as charged, the court fixed the punishment at a fine of \$1,000, and the defendant has appealed.

The appellant urges that the statute under which he is being prosecuted is unconstitutional, for the reason that its title is insufficient under § 19, art. 2 of the state constitution, which provides that "No bill shall embrace more than one subject, and that shall be expressed in the title." The title of the act is as follows: "An act to protect stockholders and persons dealing with corporations in this state." It is first contended that inasmuch as the act describes a crime, and fixes a penalty, the title is insufficient in that it fails to so indicate. It is argued that, under the title of this act, the legislature could have provided remedies entirely civil in their nature, and that from a reading of the title one would not necessarily expect to find that the body of the act contains a penalty. There has been much conflict of decision upon this subject under similar constitutional provisions. Appellant cites *State v. Clark*, 43 Wash. 664, 86 Pac. 1067, as involving a title similar to the one now before us. That title was as follows: "An act for the protection of builders and declaring an emergency." It was held to be insufficient, and the act was declared void. The gravamen of the argument in the opinion was,

however, directed to the indefinite character of the title in that the words used did not show with sufficient clearness who were to be protected by the act, the term "builders" being one of such elastic application that it might include owners as well as contractors, independent contractors, or even other persons, and the act manifestly could not have been intended for the protection of all. The fact that the title failed to state that the act carried a penalty was not directly discussed. In the later case of *State v. Ames*, 47 Wash. 328, 92 Pac. 137, this precise point was decided against appellant's contention. The title of the act there considered was as follows: "An act to establish pilots and pilot regulations for the Straits of Juan de Fuca, Puget Sound, and all American waters pertaining thereto." The court said of the above title:

"But we think the title sufficient to include the penalty. The general rule under similar constitutional provisions is that a title such as the one in question is sufficiently broad to include a penalty."

A number of authorities are there cited. However inadvisable such an omission may be from a legislative standpoint, yet by the above decision it is settled in this jurisdiction that the constitutional provision is not necessarily violated by a mere failure to state in the title of an act that the act itself carries a penalty. The fact that the former case involved a statute providing punishment as for misdemeanor only can make no difference in principle.

It is, however, contended that the title is insufficient in another particular. It will be observed that it is limited to the protection of stockholders and persons dealing with corporations, while the body of the act provides that the publication of the fraudulent or exaggerated statement to persons "dealing with such corporation or its stock" shall subject one to punishment. The act thus clearly makes it a penal offense to publish the false statement to persons dealing with the corporation. It is also with equal clearness made an offense to issue such a statement to persons dealing with the stock of

Dec. 1907]

Opinion Per HADLEY, C. J.

the corporation. Dealing with a corporation and merely dealing with its stock are distinct subjects. One may deal with the stock of a corporation in the open market and in no sense deal with the corporation. The subject of dealing with the stock is clearly not comprehended in this title, and to that extent the act must be held invalid.

We think, however, that the act must stand so far as it relates to dealing with corporations. Appellant insists that in any event it must be restricted to stockholders who deal with corporations. It is claimed that in the expression "to stockholders or to other persons dealing with such corporation," the word "stockholders" preceding "other persons" limits the other persons to stockholders. If stockholders were mentioned in general as an entire class, there might be force in the argument, and the word "or other persons" under the authorities might then be limited to the same general class as those described in the preceding words. Stockholders as an entire class are, however, not designated, but only those dealing with corporations. The comprehensive class specified therefore includes all persons dealing with corporations, stockholders who so deal as well as others. The dealing with corporations, as mentioned in the act, must mean more than the mere act of holding stock and refers rather to ordinary contractual dealing, which may be done by either stockholders or others.

With the above views of the statute it must first be determined whether the demurrer to the information should have been sustained. It will be observed by reference to the quotation from the information hereinbefore set out that it was charged that the false statement was made to one Adams, a person dealing with the corporation and its stock. Appellant contends that the charge is duplicitous in that an attempt is made to charge two crimes. Under our holding above, that the portion of the statute which relates to dealing with the stock of a corporation must fall, it follows that the part of the information in relation to that subject charges no crime,

and it is merely immaterial. The averment is, however, clearly made that the false statement was made to a person dealing with a corporation, which charges a single crime under the statute, and for reasons heretofore stated it was not necessary to describe such person as a stockholder. We therefore hold that it was not error to overrule the demurrer to the information.

At the trial Adams testified that he bought stock in the corporation as the result of a false statement, and that as resulting from the same thing he arranged with the corporation to take charge of the Portland office as manager. The appellant himself also testified to the same effect concerning the arrangement with Adams to take charge of the Portland office. The latter arrangement was clearly dealing with the corporation, but the evidence was also decidedly directed to the matter of dealing with the stock, and the cause was submitted to the jury on the theory that both elements were included in the charge. This was error under our views of the statute, and the judgment will have to be reversed so that the cause may be submitted to a jury upon the one feature only, that of issuing a false statement to Adams as a person dealing with said corporation.

Inasmuch as a new trial must be granted we need not discuss all the other errors assigned, but as one or two matters may arise on the new trial, it is advisable that reference shall be made to them here. One of the material allegations of the information is that the concern with which Adams was dealing was a corporation. That fact was a particularly material one at the trial, for the reason that if the concern had not a corporate capacity, no crime was committed under the terms of the statute. The only proof of the corporate capacity was oral testimony admitted over appellant's objection. We think the proof of so material a fact which must peculiarly rest in a higher class of testimony should have been made from the necessary records as the best evidence. In this regard we think the court erred.

Dec. 1907]

Statement of Case.

Appellant demanded that he be tried jointly with one Wentworth, who was jointly charged with him. The record does not show that process was ever served upon Wentworth, or that he was ever taken into custody and thereby became an actual party defendant. If Wentworth had been put upon trial at the same time, he could have demanded a separate trial under the terms of Bal. Code, § 6949 (P. C. § 2198); so that appellant had no absolute right to be tried jointly. But whatever may have been his right with respect to such a demand, if Wentworth had been actually in custody and had not demanded a separate trial, still, so far as the record discloses, appellant was the only real party defendant, and the court did not err under such circumstances.

The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion.

RUDKIN, FULLERTON, MOUNT, and CROW, JJ., concur.

DUNBAR, J., dissents.

[No. 7099. Decided December 12, 1907.]

STANLEY E. DEAN, *Appellant*, v. THE CITY OF WALLA WALLA *et al.*, *Respondents*.<sup>1</sup>

MUNICIPAL CORPORATIONS—INDEBTEDNESS—LIMIT. Bonds payable out of the revenues of a water system do not constitute part of the general municipal indebtedness, to be considered in determining its debt limit.

SAME—ADDITIONAL INDEBTEDNESS—COMPUTATION. Bonds issued for the purchase of water works, payable out of the city's general fund, may be considered as part of the five per cent additional indebtedness allowed by the constitution for water, light, and sewer purposes, although the city had not reached its five per cent limit for general indebtedness.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered November 21, 1907, dis-

<sup>1</sup>Reported in 92 Pac. 895.

missing an action to enjoin the issuance of municipal bonds. Affirmed.

*Dunphy, Evans & Garrecht*, for appellant.

*Oscar Cain* and *J. C. Hurspool*, for respondents.

Root, J.—The city of Walla Walla authorized the issuance of municipal bonds in the sum of \$100,000, for the purpose of erecting a city hall and fire station. The plaintiff instituted this proceeding to enjoin the issuance of said bonds upon the ground that the city was indebted in a sum in excess of five per cent of the taxable property, as shown by the last municipal assessment. From a judgment of dismissal, plaintiff appeals.

The record presents two questions. It appears that the city has outstanding certain bonds that are made payable out of the revenues of the water system. Appellant contends that the amount of these bonds should be taken into consideration in determining whether or not the general indebtedness exceeds the five per cent limitation prescribed by § 6, art. 8, of the state constitution. Respondents maintain that these bonds do not constitute a part of the general indebtedness of the municipality. We think this contention must be upheld under the authority of former decisions of this court. *Winston v. Spokane*, 12 Wash. 524, 41 Pac. 888; *Kenyon v. Spokane*, 17 Wash. 57, 48 Pac. 783; *Faulkner v. Seattle*, 19 Wash. 320, 53 Pac. 365; *Baker v. Seattle*, 2 Wash. 576, 27 Pac. 462; *Fogg v. Hoquiam*, 23 Wash. 340, 63 Pac. 234; *German-American Sav. Bank v. Spokane*, 17 Wash. 315, 49 Pac. 542, 38 L. R. A. 259; *State ex rel. Attorney General v. McGraw*, 13 Wash. 311, 43 Pac. 176.

Another contention of appellant is that bonds in the sum of \$133,000, heretofore issued for the purchase of water works and payable out of the general fund, must be considered as a part of the indebtedness for general municipal purposes and not as a portion of the five per cent additional indebtedness al-

Dec. 1907]

Statement of Case.

lowed by the constitution for water, light, and sewer purposes—that the city could only incur obligations to be deemed a portion of the five per cent additional indebtedness, after it had reached the five per cent limit of general indebtedness. The former holdings of this court have pronounced against this contention. *Austin v. Seattle*, 2 Wash. 667, 27 Pac. 557; *Petros v. Vancouver*, 13 Wash. 423, 43 Pac. 361.

Under the view we entertain of the outstanding bonds mentioned, the indebtedness of the city would permit the issuance of the bonds now sought to be enjoined without exceeding the constitutional limitation. We perceive no reason why they may not be legally issued. The judgment of the superior court is therefore affirmed.

HADLEY, C. J., FULLERTON, RUDKIN, MOUNT, CROW, and DUNBAR, JJ., concur.

[No. 6991. Decided December 13, 1907.]

THE STATE OF WASHINGTON, *Respondent*, v. HOLLIS W. KEITH, *Appellant*.<sup>1</sup>

ADULTERY—ELEMENTS OF OFFENSE—PERSONS LIABLE. Under Bal. Code, § 7230, defining adultery as the sexual intercourse between a married person and one who is not such married person's husband or wife, an unmarried man living in a state of adultery with a married woman is guilty of the offense, the statute applying to both parties.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered April 12, 1907, upon a trial and conviction of the crime of living in a state of adultery. Affirmed.

*Cain & Hurspool*, for appellant.

*Otto B. Rupp* and *John H. McDonald*, for respondent.

<sup>1</sup>Reported in 92 Pac. 893.

Root, J.—Appellant was convicted of the crime of living in a state of adultery, upon an information drawn under Bal. Code, § 7231 (P. C. § 1799). From the judgment he appeals.

It appears that appellant, at the time of the commission of the alleged offense, was an unmarried man, and that the woman with whom he was living was the wife of another. It is contended by appellant that an unmarried man cannot be held under this section of the statute, which reads as follows:

“Every person who lives in a state of adultery, upon conviction thereof, shall be punished by imprisonment in the state prison not exceeding five years.”

It is his contention that, if guilty of any offense, it is that provided against by Bal. Code, § 7238 (P. C. § 1790), which reads as follows:

“If any man or woman, not being married to each other, lewdly and viciously associate and cohabit together, . . . every such person shall be punished by imprisonment in the county jail not exceeding six months, or by fine not exceeding two hundred dollars.”

It is urged in his behalf that only the married woman could be held under the statute under which he is here prosecuted. The statute does not define the offense here charged. Bal. Code, § 7230 (P. C. § 1798), defines the crime of adultery as follows:

“Adultery is the sexual intercourse between a married person and one who is not such married person’s husband or wife.”

It would seem that § 7231 must be read in the light of § 7230. Under the common law, adultery was not an indictable offense. In civil matters, however, the common law offense was understood in a somewhat different sense from that implied by the canon or civil law. In this country the decisions as to what constitutes adultery have not been harmonious. It is urged, and there is much support of the contention, both in the English and American decisions, that the gist of the offense consists in the adulteration, or possible adulteration, of

Dec. 1907]

Opinion Per Root, J.

the issue of the woman's husband; that by reason of the offense such husband is likely to have a child not his own imposed upon him for support and as his heir, to the detriment of himself and his legitimate issue. For this reason many of the cases hold that the wife only could be guilty of the offense, and that her paramour would be guilty only of lewd and illicit cohabitation. In some states, however, under the common law or statutes somewhat similar to our own, both offenders have been held to be equally guilty of adultery.

As the statutes in the various states differ considerably from ours, we are not able to get very much assistance from the large number of decisions and other authorities which the attorneys for the respective parties in this case have called to our attention in their briefs. The case presents the question of what was intended by our statutes. Section 7230 is couched in very plain language, and it would seem to be too plain for construction. Giving to the language its ordinary meaning, it indicates that the legislature intended each of the offending parties to be held equally guilty with the other. Upon principle, it is difficult to conceive of any adequate reason why they should not be deemed equally guilty of the same offense. The scandal and evil consequences of a married woman and a man not her husband living and cohabitating together as husband and wife are such that we can see no sufficient reason why the legislature should say that the woman should be held guilty of a felony but the man only of a misdemeanor. The trial court evidently took the view that the statute applied equally to each, and we believe such conclusion to be correct.

The judgment is affirmed.

HADLEY, C. J., RUDKIN, DUNBAR, and CROW, JJ., concur.

MOUNT and FULLERTON, JJ., took no part.

[No. 6869. Decided December 13, 1907.]

DAVID M. HOFFMAN, *Respondent*, v. AARON R. TITLOW *et al.*,  
*Appellants*.<sup>1</sup>

VENDOR AND PURCHASER—REMEDIES OF VENDEE—RECOVERY OF PAYMENT—DEFENSES—TITLE—ADVERSE POSSESSION. A contract for the purchase of real estate calling for an abstract showing perfect title may be rescinded by the vendee and payment made recovered, where the abstract shows that a strip of the lot and a wall thereon had been conveyed to the adjoining owner, who asserted title thereto; and the fact that the adjoining owner had never used the same, and had paid no taxes, and that the vendors had been in adverse possession for the statutory period, is immaterial; since the purchaser may demand a title free from hostile claims and litigation.

SAME—EVIDENCE—CORROBORATION—ADMISSIBILITY. In an action to recover purchase money paid by a vendee, after his rescission of a sale for defect in the title, evidence in corroboration of the defendant's statement that they offered to cure the defect sometime between the 22d and 25th of May, two years prior to the trial, is inadmissible when the witness cannot fix the time of the corroborative circumstance except to state that it was "a couple of years ago, somewhere about that time. I think they were figuring on the sale of the property."

Appeal from a judgment of the superior court for Pierce county, Yaakey, J., entered March 16, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action to recover purchase money paid on a contract for the sale of real property. Affirmed.

*A. R. Titlow and Ellis & Fletcher*, for appellants.

*Hudson & Holt*, for respondent.

MOUNT, J.—The parties to this action entered into the following agreement:

"Receipt for Earnest Money.

"Tacoma, Wash., May 16, 1905.

"Received from D. M. Hoffman the sum of five hundred dollars as earnest money and part payment for the following

<sup>1</sup>Reported in 92 Pac. 888.

Dec. 1907]

Opinion Per MOUNT, J.

described premises, situate in the county of Pierce, state of Washington, to wit:

"Lot 10 in block 1203, New Tacoma, this day sold to D. M. Hoffman for the sum of \$25,955, the balance of \$25,455 to be paid as follows: \$4,000 by conveyance to A. R. Titlow and H. H. Gove of lots 9 to 12 inc. Blk. 3514, New Tacoma, by warranty deed free and clear of encumbrances and the assumption of the mortgage by said Hoffman aggregating \$10,000. Vendor to pay interest on said mortgages to the date of the transfer of said premises and \$11,455 in gold coin, and upon full payment as stated above the vendor agrees to deliver a warranty deed, conveying good title free from all incumbrances, except as above, as shown by a complete abstract of title, certified by a responsible abstractor, to be furnished by vendor on or before May 18, 1905, and to be examined by the said purchaser within five days thereafter. If said abstract does not show such title or cannot be made to do so within ten days from notice of defects, then this agreement to be void, and all payments hereunder shall be refunded. Otherwise, if the said purchaser refuse to complete the purchase in accordance with the terms hereof, all payment made shall be forfeited as a commission and compensation for examining property, abstract and papers, but such forfeiture shall not impair the right of either party to pursue the usual remedies for breach of this contract. Said Hoffman to furnish a complete abstract of title to lots 9 and 12 inc. Block 3514.

H. H. Gove, A. R. Titlow.

"I agree to purchase the said above described premises upon the terms herein set forth. D. M. Hoffman, Purchaser."

At the time this agreement was entered into, the respondent paid to the appellants the \$500 therein mentioned, and a few days later abstracts of title were furnished by each party to the other. Thereupon the respondent was advised by his attorney, who examined the abstract of title of lot 10, block 1203, New Tacoma, that the title was defective, for the reason that a strip thereof upon which was erected a brick wall had been conveyed to, and was then owned by, the National Bank of Commerce of Tacoma. Respondent thereupon notified ap-

pellants of this defect of title, and requested them to make the title clear.

It appears that while this strip of land and the wall thereon had been conveyed to the bank in the year 1882 or 1883, the bank had not used the wall, but had subsequently erected a large building on their own lot adjoining, without using the wall or occupying any part of lot 10 of block 1203. Appellants insisted that the conveyance to the bank was not an incumbrance but was a benefit, and that the bank had no intention of ever using the strip or the wall thereon, had never paid any taxes thereon, and had abandoned the same. Respondent, however, insisted that the appellants should obtain an acquittance from the bank which, it is alleged, appellants failed and refused to do, and appellants thereupon rescinded the contract by notifying respondent that the sale was off and the \$500 was forfeited. Respondent thereupon brought this action to recover back the \$500 paid on the contract. Appellants by their answer denied that they had rescinded the contract or refused to comply with the terms thereof, and alleged affirmatively that they were able, ready, and willing at all times to comply with the terms of the contract, and within time offered to convey to plaintiff a clear title to said lot 10 of block 1203, free from all liens, incumbrances, easements, or threatened clouds; that plaintiff refused to accept the same, and that defendants were thereby damaged in the sum of \$1,000. Upon these issues being tried to the court and a jury, a verdict was returned in favor of the plaintiff for \$500 and interest. The defendants appeal from a judgment entered thereon.

There was but one substantial issue of fact at the trial, and that issue was clearly defined by the pleadings, viz., did the appellants rescind the contract by declaring the sale off without tendering or offering the title free from incumbrances? The evidence upon this question was about evenly balanced so far as the record before us discloses, and was therefore strictly a question for the jury, and the findings of the jury upon it are conclusive.

Dec. 1907]

Opinion Per MOUNT, J.

It is contended by appellants, however, that the court erred in excluding evidence offered by the appellants, to the effect that the National Bank of Commerce had not occupied the part of lot 10 deeded to it in 1882, and had made no claim thereto since 1892, but that defendants and their predecessors had been in actual, open and notorious possession of the whole of the lot for more than ten years, and had paid the taxes thereon. If it were conceded that the title standing in the bank did not, under these circumstances, constitute a cloud upon the title, nevertheless this evidence was not material because the bank at that time was claiming title and demanding a substantial sum for its interest in the lot. This fact is clearly shown and, in fact, is apparently conceded. The admitted contract stated that the vendor agreed to convey a good title, free from all incumbrances except certain stated incumbrances. The purchaser under this contract was entitled to demand a title free from hostile claims and possible litigation. *Miller v. Philips & Co.*, 44 Wash. 226, 87 Pac. 264; 28 Am. & Eng. Ency. Law (2d ed.), p. 111, and cases cited. It was not error to exclude the evidence under the state of facts shown. Nor was it error to refuse to instruct the jury, based upon the alleged abandonment by the bank or of adverse possession by the appellants, because the facts did not warrant submitting that issue to the jury. What we have said upon this question disposes of all the assignments of error based upon the instructions.

Appellants further contend that the court erred in excluding the testimony of Mr. Albertson, an officer of the bank, to the effect that he promised the appellants, between the 25th and the 26th day of May, 1905, to convey or release all the bank's interest in the lot to the appellants. It is argued by the appellants that this evidence was admissible, because it amounted to an act of the appellants and corroborated their evidence to the effect that they offered to procure a deed from the bank, and told the respondent that they had made arrange-

ments therefor. Conceding, for the purposes of this case, that this was such an act of the appellants as might be proved in corroboration of their statements, the offer was not made until after Mr. Albertson had testified that he had a conversation with appellants in the year 1905 (which was about two years prior to the trial) in reference to the claim of the bank to the portion of the lot in question. He was then asked, "Was that between the 22d and 25th days of May 1905—along about there?" He answered: "It was a couple of years ago. I couldn't give the exact date. It was somewhere about that time. I think they were figuring on the sale of the property." The issue in the case was whether the appellants, at a meeting, or rather several meetings, which occurred between the 22d and the 25th days of May, 1905, rescinded the contract by declaring the sale off. The respondent's evidence is to the effect that appellants voluntarily declared the sale off, while appellants' evidence is to the effect that they not only did not do so, but offered to obtain a release from the bank. It was conceded that appellants afterwards purchased the interest or claim of the bank to the lot.

If the evidence offered was admissible at all, it was only so because it amounted to an *act* of the appellants to comply with the respondent's demand for a good title. It was necessary then to show that this act or conversation preceded the time when the offer to convey was made. Otherwise it was clearly inadmissible, because what was said or done afterwards between appellants and third parties had no bearing whatever upon the case. We are of the opinion that the statements of the witness as to the time he had the conversation were not sufficiently definite to make the evidence admissible as corroborative evidence, or to make its exclusion reversible error.

We find no error in the record, and the judgment must therefore be affirmed.

HADLEY, C. J., DUNBAR, ROOT, and CROW, JJ., concur.

Dec. 1907]

Opinion Per DUNBAR, J.

[No. 6792. Decided December 13, 1907.]

MAMIE M. REDFIELD, *a Minor, by Her Guardian Ad Litem,*  
*John J. Redfield, Appellant,* v. SCHOOL DISTRICT NO.  
 3 OF KITTITAS COUNTY, *Respondent.*<sup>1</sup>

**SCHOOL DISTRICTS—LIABILITY FOR PERSONAL INJURIES—GOVERNMENTAL FUNCTIONS.** A school district is liable for the negligent act and omissions of its officers or agents whereby a bucket of hot water, used in connection with the heating apparatus of a schoolroom, is overturned and a pupil burned or scalded, under Bal. Code, §§ 5673, 5674, authorizing actions against a school district for an injury arising from some act or omission of the district, the statute applying to governmental functions.

Appeal from a judgment of the superior court for Kittitas county, Rigg, J., entered September 29, 1906, upon sustaining a demurrer to the complaint, dismissing an action against a school district for personal injuries sustained by a minor through the overturning of a bucket full of hot water. Reversed.

*Pruyn & Felkner*, for appellant.

*Hovey & Hale* and *Graves & McDaniels*, for respondent.

DUNBAR, J.—This is an action against school district No. 3 in Kittitas county. The complaint alleges, in substance, that while Mamie Redfield, a minor, was attending the public school in said district, in the public schoolhouse where she had a right to be as a student of the public schools, the schoolroom was heated by a furnace; that there was a register in the floor of said schoolroom through which the heat of said furnace would come into said room and heat the same, and that when the said furnace was fired, the district and its agents, servants, teachers, and employees, carelessly and negligently kept and maintained upon said register a large metal bucket of the ca-

<sup>1</sup>Reported in 92 Pac. 770.

capacity of more than three gallons, and caused said bucket to be kept nearly full of water; that by reason of the heat from said register, the water in the bucket was kept scalding hot; that the register was in or near the center of the schoolroom, and said bucket was carelessly and negligently kept and left by the defendant and its agents, servants, teachers, and employees wholly unguarded and unprotected in any manner whatever, and was liable at any time to be upset and overturned; and avers that on or about the 9th day of January, 1906, said bucket full of scalding water was upset and overturned, without any fault of the plaintiff, said Mamie Redfield, and that the scalding water from the bucket ran over the legs and feet and lower part of the body of the said Mamie Redfield and injured her in the manner described in the complaint. To this complaint the defendant district filed a general demurrer. The court sustained the demurrer upon the ground that the plaintiff had no right of action against the district. The cause was dismissed, judgment entered for costs, and appeal followed.

It will be seen that the only question for determination is whether a school district in this state is liable for the negligent acts or omissions of its officers and agents in the performance of their duties. It may be conceded that school districts are involuntary corporations, organized not for profit or gain but solely for the public benefit, and as a means of carrying out the scheme of the state to educate its citizens. The same thing, however, may be said of cities and counties, though their objects and purposes are different and their powers are not so limited as the powers of school districts. This, however, is simply a matter of degree; they are all formed for the benefit of the public and not as money-making corporations, and all have delegated governmental functions to perform. It is contended by the respondent that it appears from the averments of the complaint that the agents of the school district in question were performing governmental functions and that, under

Dec. 1907]

Opinion Per DUNBAR, J.

the great weight of authority, the corporation is not liable, under the doctrine of *respondeat superior*, for the negligent acts or omissions of its officers or agents; and to sustain this contention many adjudicated cases, as well as the announcement of text-writers to that effect, are cited. We have examined all of these authorities and it may, we think, be conceded that in the main they correctly state the law so far as the weight of authority is concerned, though it must be admitted that many of the distinctions which are made between the performance of governmental duty and duties which are not considered governmental are exceedingly filmy, and frequently seem to be distinctions without difference. The citation from vol. 5, Thompson Com. on Negligence, § 5839, to the effect that,

“In the construction and reparation of a public schoolhouse, a municipal corporation is deemed to act in the discharge of a public or governmental duty, and not as a private corporation. It is, therefore, not liable in damages for an injury proceeding from the fact that it has negligently constructed a schoolhouse or allowed it to become dangerously defective,—as where, through the defective insulation of a lightning-rod on a schoolhouse, a pupil is struck by lightning; or where, by reason of a defective heating-apparatus in a public schoolhouse, a pupil is burned and scalded;”

which seems to be exactly in point, like the other authorities cited, is simply an announcement of the common law rule, and the cases cited by that author to sustain this unqualified announcement are all of the same character.

The first case cited by the learned author is *Hill v. Boston*, 122 Mass. 344, where, in an exhaustive opinion, all of the principal cases, both English and American, are reviewed; but they discussed only the common law liability, it appearing that there was no statute on the subject, while it was stated in many of the opinions, in cases of seeming hardship, that the legislature must be looked to for relief; and the supreme court of Massachusetts itself, eight years after the decision in *Hill v. Boston*, in *Lyman v. Hampshire*, 140 Mass. 311, 3 N. E.

211, held that the county was liable to a person injured from a defect in a bridge by reason of a statute granting a right to recover in such cases. In this case a discussion of the common law doctrine is unprofitable for the reason that there is a statutory enactment on the subject. Bal. Code, § 5673 (P. C. § 1355), is as follows:

“An action at law may be maintained by any county, incorporated town, school district, or other public corporation of like character in this state, in its corporate name, and upon a cause of action accruing to it, in its corporate character, and not otherwise, in either of the following cases, . . .”

stating the cases. Section 5674 (P. C. § 1356) provides that:

“An action may be maintained against a county, or other of the public corporations mentioned or described in the preceding section, either upon a contract made by such county or other public corporation in its corporate capacity, and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such county or other public corporation.”

With the inapplicable portions of the two sections omitted, the law would read as follows: An action may be maintained against a school district for any injury to the rights of the plaintiff arising from some act or omission of such district. It seems to us that this statute is scarcely susceptible of construction. The complaint in this case shows that there was an injury to the right of the plaintiff, and that it arose from an act of negligence and an omission of duty on the part of the agents of the school district. It was the right of the plaintiff presumably to attend school in the building in which she was injured, and she had a right to the reasonable protection of her person while attending such school. This right it seems, under the allegations of the complaint, was violated, and she was thereby deprived of it. The school district had a duty to perform. This duty is imposed by statute. Among its prescribed duties are the duties to rent, repair, furnish and insure schoolhouses, to employ and for sufficient cause to dis-

Dec. 1907]

Opinion Per DUNBAR, J.

charge teachers, to enforce rules and regulations prescribed by the superintendent of public instruction for the government of the schools and teachers, and in general to see that the school is conducted in a manner tending to carry out the object for which schoolhouses are built and school districts organized.

It is contended by the respondent that it was not the intention of the legislature to make the act aforesaid apply to governmental duties, and that the acts complained of were in the performance of strictly governmental duties. The school district is a creature of the statute, and the state is not limited in its authority over the district, and would have power to make it responsible in the performance of governmental duties as well as any other kind of duties. If the acts complained of were perpetrated in the performance of a governmental duty, it would be difficult to conceive what duties the legislature had in mind in enacting the statute. It is more probable that, in contemplation of the common law rule, it was attempting to remove the limitations and restrictions of such rule and make the district responsible generally for an omission of duty. In any event, the law itself has not incorporated the limitations claimed for it by the respondent, and if its theory is correct, it would have been an idle thing for the legislature to have passed the law making the district responsible for acts for which it was already responsible before the enactment of the law, viz., acts which were not governmental. In any event, this statute has been construed by this court in *Kirtley v. Spokane County*, 20 Wash. 111, 54 Pac. 936, where the action was for an injury to the rights of the plaintiff arising from the act or omission of the county of Spokane in maintaining a defective bridge. In that case, after admitting practically the general rule contended for by respondent in this case, and quoting from the opinion of Lord Kenyon, in *Russell v. Men of Devon*, 2 Term R. 667, this court says that,

“Our statute expressly meets the suggestions of Lord Kenyon, *supra*, that ‘if it be reasonable they should be by law liable to such an action, recourse must be had to the legislature

for that purpose.' Not only is provision made for an action against the county upon contract within the scope of its authority, but an injury to the right of the plaintiff arising from some *act* or *omission* of the county."

This reference was to the statute now under discussion, and this court cited the case of *McCalla v. Multnomah County*, 3 Ore. 424, a case decided under a similar statute, *Lyman v. Hampshire*, *supra*, and many other cases.

Believing that the statute clearly gives the right of action attempted to be enforced in this case, the judgment will be reversed, and the cause remanded with instructions to overrule the demurrer.

RUDKIN, FULLERTON, MOUNT, and ROOT, JJ., concur.

HADLEY, C. J. and CROW, J., took no part.

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[No. 6838. Decided December 13, 1907.]

WHATCOM COUNTY, *Appellant*, v. JAMES YELLOWKANIM,  
*Respondent*.<sup>1</sup>

EMINENT DOMAIN—APPEAL—DECISIONS REVIEWABLE—CERTIORARI. No appeal lies from an order in condemnation dismissing proceedings by a county to condemn property for a county road, there being no statute authorizing an appeal and the remedy being by certiorari.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered March 25, 1907, upon sustaining a demurrer to the amended petition, dismissing an action to condemn land for the use of a public highway. Appeal dismissed.

*Virgil Peringer* and *George Livesey*, for appellant.

*Hardin & Hurlbut*, for respondent.

<sup>1</sup>Reported in 92 Pac. 892.

Dec. 1907]

Opinion Per DUNBAR, J.

DUNBAR, J.—The appellant, Whatcom county, presented to the superior court of that county its petition praying for the condemnation of certain land described in said petition, said land being private property. Notice in condemnation was served, and thereafter respondent appeared and demurred to the appellant's amended petition. The demurrer was sustained, and the appellant declining further to plead, the court dismissed the case, to appellant's cost. From such action of the court, this appeal is taken.

The respondent interposes in this court a motion to dismiss the appeal, upon the grounds that no authority for appeal sought to be taken herein exists, and that the court has no jurisdiction of the respondent or of the subject-matter of this action. This motion must be sustained. We decided in *Western American Co. v. St. Ann Co.*, 22 Wash. 158, 60 Pac. 158, that the appeal in condemnation cases brought before this court only the propriety and justice of the amount of damages, and that no question could be raised upon appeal in condemnation proceedings other than as to the amount of damages; that the general statute in relation to appeals did not apply. In that case the contention of the appellant was, that the land sought to be condemned was attempted to be appropriated for a private and not a public use; that the respondent was not authorized by its charter to condemn the right of way or exercise the right of eminent domain; and that respondent was estopped for certain reasons from claiming the right of eminent domain.

In this case the legal question involved is that a county has not power to condemn, under the laws of the state of Washington providing for the taking of private property for public use, through the right of eminent domain; that the appellant did not commence the action in pursuance of any procedure theretofore had in the establishment of a public highway, and therefore was not endeavoring to pursue its remedy by virtue of any authority to condemn provided for in the laws regulat-

ing the establishment of roads or public highways. After the decision of the case just above referred to, the legislature attempted to make provision for an appeal which would bring other questions before the supreme court, which law is found in the Laws of 1901, page 213. But that statute was held invalid in *State ex rel. Seattle Elec. Co. v. Superior Court*, 28 Wash. 317, 68 Pac. 957, so that the law is in effect as it was when the case of *Western American Co. v. St. Ann Co.*, *supra*, was decided. This decision has been reaffirmed many times by this court, and especially in *State ex rel. Pagett v. Superior Court*, 46 Wash. 35, 89 Pac. 178, where, in a proceeding to condemn, a demurrer had been interposed to the petition, which was overruled and a hearing had at which the court adjudged the proposed use of the property to be a public use. Relators thereupon applied to this court for a writ of review to correct the judgment and order of the superior court. This application was opposed by the respondents for the reason that the relators, as alleged, had a plain, speedy, and adequate remedy by appeal. The court, in passing upon that objection, said:

“With reference to the first objection it is provided by the statute that the county commissioners, in the establishment of roads, in cases where the owner of the land does not accept the award the county makes him, shall direct proceedings to procure a right of way to be instituted in the superior court in the manner provided by law for the taking of private property for public use under the statutes of eminent domain, and of course the procedure provided in that statute governs the proceedings in the superior court. In the case of *Western American Co. v. St. Ann Co.*, 22 Wash. 158, 60 Pac. 158, we held that the statute of appeals relating to proceedings in eminent domain permitted an appeal only from the propriety and justice of the amount of damages awarded, and did not permit an appeal from the order of condemnation. In numerous subsequent cases we have held that this order could be reviewed by the writ of review, and to so review it has become the established practice.”

Dec. 1907]

Syllabus.

It must logically follow that if, as we decided in the *St. Ann* case, the appeal brings to this court only the propriety and justice of the amount of damages awarded, it would not bring the questions which were raised by the demurrer in this case. In conformity with the established practice of this court in this character of cases, the appellant's remedy was by certiorari, and the motion to dismiss the appeal will be sustained.

HADLEY, C. J., CROW, and RUDKIN, JJ., concur.

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[No. 6809. Decided December 16, 1907.]

THE STATE OF WASHINGTON, *Respondent*, v. NELS WINNETT,  
*Appellant*.<sup>1</sup>

RAPE—EVIDENCE—INTENT—STATEMENTS OF DEFENDANT. In a prosecution for rape, a statement by defendant antedating the commission of the crime is admissible, where it showed his state of mind and intention to commit the crime.

SAME—WITNESSES—PRIVILEGE—PHYSICIANS. In a prosecution for statutory rape upon one under the age of consent, evidence as to pregnancy, by a physician who had made an examination, is admissible, where the relation of physician and patient did not exist, and no confidence was violated.

SAME—TESTIMONY OF WIFE. In a prosecution for statutory rape upon one under the age of consent, who had since married the defendant, it is error to require the wife to appear in court for the purpose of being identified by a witness, when her condition as to pregnancy was apparent and could be observed by the jury, thereby in reality compelling the wife to become a witness against the defendant.

SAME—CRIMINAL LAW—TRIAL—IMPROPER CONDUCT OF COUNSEL. In such a case, it is improper to call the wife to testify for the purpose of parading her condition before the jury and compelling the defendant to urge an objection which would tend to prejudice his case; and the same would be ground for reversal where it tended to prejudice the rights of the defendant.

<sup>1</sup>Reported in 92 Pac. 904.

Appeal from a judgment of the superior court for Columbia county, Miller J., entered February 8, 1907, upon a trial and conviction of the crime of rape. Reversed.

*Will H. Fouts and Hardy E. Hamm*, for appellant.

*R. M. Sturdevant*, for respondent.

DUNBAR, J.—The defendant was convicted of statutory rape, alleged to have been committed on the person of Bessie Braden, she being at the time of the alleged offense under the age of eighteen years. Appellant was sentenced to two years' imprisonment in the penitentiary. Between the alleged commission of the crime and the trial of the cause, appellant and Bessie Braden were married, and she was his wife at the time of the trial. All of the witnesses, except the father of Bessie, were excluded from the courtroom during the trial.

The appellant's first contention is that the court erred in overruling objections to the testimony of witness Adkins, for the reason that the statement made by the appellant to said witness antedated the alleged commission of the crime and was neither an admission nor a threat. The disgusting obscenity of the statement testified to by Adkins will not permit its reproduction here. Suffice it to say that it showed what the mind of the appellant then was, and his intention to commit the crime alleged if opportunity presented, and was admissible under all authority.

It is also contended that the court erred in allowing Dr. Van Patten to testify, over appellant's objection, to the result of an examination made by him, whereby he ascertained, and so testified, that Bessie Winnett, nee Braden, was in a family way. There is nothing here tending to show that the relation of physician and patient existed between them, or that any confidential relation whatever existed. The record does not indicate, but presumably the examination was made at the instance of the state, and was made for the purpose of publishing the result of the examination. No confidential re-

Dec. 1907]

Opinion Per DUNBAR, J.

lation appears to be violated. The case does not come within the spirit or reason of the law which prohibits physicians from giving information acquired in attending a patient, and no error was committed in admitting the testimony objected to.

We have examined the record with reference to the other alleged errors in the admission and rejection of testimony, but with the exception of two alleged errors, which we will hereafter refer to, there is no merit in appellant's several contentions in that regard.

During the testimony of Dr. Van Patten, the prosecution asked that appellant's wife be brought into the courtroom, ostensibly to be identified by the witness as the same person whom he had examined that day. This was strenuously objected to by the appellant, but the objection was overruled, and the wife was called. It is contended by the appellant that, notwithstanding the fact that the law will not permit the wife to testify against him without his consent, by this pretense she was actually made an exhibit for the state. We think the appellant has just ground for complaint in this respect. The wife was in reality a witness against him, by being brought in sight of the jury where her condition as to pregnancy, which was a fact which the state sought to prove, could be observed and noted by the jury. This might have been evidence of the most convincing and telling character, and being produced before the jury, just after the testimony of Dr. Van Patten in relation to her pregnancy and the possible length of time which she had been in that condition—presumably six months, it would not be slanderous to impute to the jurors a careful scrutiny of the witness with a view of determining for themselves the probable correctness of the doctor's diagnosis. The result was that, while the wife could not testify as to her condition, by this subterfuge she actually did testify in a manner more convincing than mere words would have been.

It is contended by the respondent that the record does not actually show that she was brought into the courtroom in

actual view of the jury ; but an examination of the record does not sustain this contention, for while it does not show the exact position of the witness, it does show that she was brought in by order of the court and was identified by Dr. Van Patten, thereby making her particularly conspicuous. It does not seem that it was at all necessary to parade her in the courtroom for the purpose suggested. The doctor could have testified that he knew Bessie Winnett, the wife of the appellant, and that it was she whom he had examined, just as such identifications are ordinarily made. The whole record shows that the proceeding was rather theatrical, and as such had no proper place in a court of justice. *State v. Carter*, 8 Wash. 272, 36 Pac. 29.

Again, the appellant's wife was called to testify for the prosecution, and the appellant was compelled to object to her testifying, and while this of itself might not be sufficient to reverse a judgment correctly obtained in other respects, it tends to throw light on the effort of the prosecution in the instance above discussed and to show a fixed determination to bring the person of the wife to the attention of the jury. The practice of compelling a defendant to urge an objection which would tend to prejudice his case was severely criticized by this court in *State v. Holedger*, 15 Wash. 443, 46 Pac. 652, and *State v. Parker*, 25 Wash. 405, 65 Pac. 776.

We think the course of conduct pursued by the prosecution in forcing the person of the wife upon the attention of the jury tended to prejudice the rights of the appellant, and for that reason the judgment should be reversed and a new trial granted.

It is so ordered.

HADLEY, C. J., CROW, ROOT, MOUNT, FULLERTON, and  
RUDKIN, JJ., concur.

Dec. 1907]

Opinion Per Root, J.

[No. 6935. Decided December 16, 1907.]

CHARLES AKIN, *a Minor, by His Guardian etc., Appellant,*  
v. BRADLEY ENGINEERING & MACHINERY  
COMPANY, *Respondent.*<sup>1</sup>

NEGLIGENCE — PROXIMATE CAUSE — DANGERS ATTRACTIVE TO CHILDREN—EXPLOSIVES. A corporation engaged in selling explosives, which throws a large number of dynamite caps along a path frequented by school children, who were liable to pick them up and explode them in some manner, is not relieved from liability by reason of the fact that a boy, eleven years of age, undertook to explode the caps by contact with dry batteries found by him in an alley; such fact not being an intervening cause constituting a defense, or the proximate cause of the injury; the method employed for causing an explosion being a matter of detail.

SAME—CONCURRENT NEGLIGENCE. In such a case, the negligence of a third party in leaving the dry batteries where they could be found by children would be a concurrent rather than an intervening cause.

SAME—CONTRIBUTORY NEGLIGENCE. It is a question for the jury whether a boy eleven years old was guilty of contributory negligence in attempting to explode dynamite caps by contact with dry batteries.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered May 3, 1907, dismissing an action for personal injuries, upon counsel's opening statement to the jury. Reversed.

*Merritt, Oswald & Merritt*, for appellant.

*M. A. Folsom and B. B. Adams*, for respondent.

Root, J.—Plaintiff brought this action to recover damages for personal injuries sustained by the explosion of a dynamite cap. When the case was called for trial, plaintiff's attorney made an opening statement to the court and jury of the facts of the case as plaintiff intended to establish them. At the

<sup>1</sup>Reported in 92 Pac. 903.

conclusion of his opening statement, and before any evidence was taken, the defendant moved for a judgment of dismissal upon such statement, which motion was granted and the case dismissed. From the judgment, this appeal is prosecuted.

The opening statement of the attorney showed these facts: That respondent was a corporation engaged in selling mining machinery, appliances, and supplies, among which were dynamite caps; that the last named are highly explosive and are used to explode dynamite in mining operations; that respondent had thrown a large number of these caps out back of its place of business, upon some vacant ground, through which a pathway ran that was used by large numbers of children going to and from a public school situated near by; that these caps were very attractive to children, and that these school children were in the habit of picking them up and afterwards throwing them against rocks, or in other ways exploding them; that on the way from school one day, this plaintiff picked up several of these cartridges and on his way threw several of them at rocks, endeavoring to explode them; that he and another boy discovered some dry batteries in an alley near an automobile garage, and proceeded to make an experiment of touching off the cap with the battery, whereby said cap did explode and tore off a thumb and finger from plaintiff's hand; that the respondent knew of the presence of these explosives and of the fact that school children were passing and repassing near where they were, almost daily, and that the same were naturally attractive to children, and that the latter were liable to be injured thereby; that plaintiff was only eleven years of age and did not know for a certainty that a battery would explode the cap, and did not know the force of the explosive or the extent of the injury that might result from such explosion.

The only question here presented is as to whether or not this opening statement of the counsel sets forth facts sufficient to defeat plaintiff's cause of action. It appears to have been the view of the trial court that the explosion of this cartridge

or cap, in the manner indicated, was not a circumstance which the respondent could reasonably have anticipated; that it was not the natural and proximate result of the conduct of respondent in leaving these explosives exposed in a place where children could and did help themselves to them; that the explosion was a result of bringing the cartridge in contact with a dry battery, and that this constituted an intervening cause which relieved respondent of liability. We are unable to entertain this view.

It is fundamental, of course, that one cannot recover for injuries against another whose act or omission was not, or did not contribute to, the proximate cause of such injury. But it is equally true that, where a negligent act or omission sets in operation a train of occurrences resulting naturally in the injury complained of, such negligent act or omission is deemed to have been the proximate cause, or to have contributed thereto.

It seems to be conceded that respondent would have been liable had the boy been injured by exploding the cartridge against a rock or with a hammer. It would seem that any natural, available method which the boy himself, through his inexperience and lack of knowledge, would adopt for the purpose of creating an explosion, would bring the case into the same category as one where the explosion was made by a rock or a hammer. For instance, if the boy had struck a match and exploded the cap with the heat thereof, or had deposited the cartridge upon a hot stove, it would seem, in principle, to be the same as if he had exploded it with a hammer or with a battery. An intervening cause, to be a defense in an action of this kind, must ordinarily come from an outside source, as an act of God or of some human or other agency, independent of the ignorant and inexperienced conduct or omission of the boy in question. The ignorance and inexperience of this boy, if found as stated by his counsel, relieves him from the charge of contributory negligence. If he knew or suspected that this

cartridge would explode when brought in contact with the battery, and was old enough and intelligent or experienced sufficiently to understand that such an explosion would probably do him serious injury, then he would not be entitled to recover. These matters were matters to be shown by the evidence and to be thereafter passed upon by the jury or court.

For the purposes of the case, as it now stands, the opening statement of the counsel must be accepted as the facts of the case. We think that, when the respondent left these dangerous explosives by the wayside where it knew that children, naturally attracted by such things, were constantly passing and repassing and playing therewith, it must be held to have known that such children were liable to cause some of said caps to explode in a manner likely to cause them serious injury, and that the explosion of such a cap by a dry battery in the manner shown herein did not constitute an intervening cause that should relieve respondent from liability. If, as urged by respondent, the owner of these dry batteries was guilty of negligence in leaving them where the children could get possession of one, it seems to us that this negligence would constitute a concurrent or contributing, rather than an intervening, cause. That the immediate agency by which the explosion was occasioned was a dry battery instead of a rock, a hammer, a match, or a coal of fire, is in our opinion a matter of detail that does not change the principle involved or justify a defense under the rule by respondent invoked.

The judgment of the honorable superior court is reversed, and the cause remanded for further proceedings not inconsistent herewith.

HADLEY, C. J., FULLERTON, MOUNT, and CROW, JJ., concur.

DUNBAR and RUDKIN, JJ., took no part.

Dec. 1907]

Opinion Per FULLERTON, J.

[No. 6941. Decided December 17, 1907.]

SUDDEN & CHRISTENSON, *Appellant*, v. BERT MORSE,  
*Respondent*.<sup>1</sup>

APPEAL AND ERROR—PARTIES—GARNISHEES. Garnishees, who filed answers, are not adversely affected by a judgment in the main case, in favor of the defendant, and are not necessary parties to an appeal therefrom.

APPEAL—REVIEW—VERDICT. The probative force of evidence is for the jury.

EVIDENCE—RELEVANCY—SIMILAR TRANSACTIONS. Upon an issue as to whether an agent in the purchase of a vessel had procured the report of a consulting engineer as to the vessel's condition, it is prejudicial error to allow the principal to show that a telegraphic report of a general nature was not the character of report intended by the contract, and to introduce evidence of a written report made by the same engineer as to the condition of another vessel, where the agent had not agreed to obtain such a report and had no knowledge of the former report.

DAMAGES—PLEADING—SPECIAL DAMAGES—ISSUES AND PROOF. In an action upon a contract, a general counterclaim for damages by reason of nonperformance of the contract, claiming loss of time and money expended, does not admit of recovery for the cost of telegrams incurred and certain other items; since the same were items of special damages that must be specially pleaded.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered April 17, 1907, upon the verdict of a jury rendered in favor of the defendant, after a trial on the merits, in an action on a bank check. Reversed.

*John C. Hogan* and *J. B. Bridges*, for appellant.

*J. C. Cross* and *W. I. Agnew* (*A. Emerson Cross*, of counsel), for respondent.

FULLERTON, J.—In this action the appellant sought to recover from the respondent the sum of \$5,004.45, and interest, alleged to be due upon a bank check, drawn by the respondent

<sup>1</sup>Reported in 92 Pac. 901.

in its favor upon the Aberdeen State Bank, which check the bank refused to pay when presented. In his answer to the complaint the respondent alleged, in substance, that the check was given the appellant to be used by it in procuring an option for the purchase of the steamer "M. P. Plant," which the respondent and certain persons associated with him, residing at Aberdeen, contemplated purchasing; that as a condition precedent to entering into the option, the appellant was instructed to procure an inspection and approval of the steamer by the government inspectors of San Francisco, California, and its approval by one F. M. Talbott, a consulting engineer; that the appellant entered into the option without procuring certificates of approval from these engineers, and acting contrary to its instructions and with the intent to defraud the respondent, took the option in the name of a firm of brokers in San Francisco, instead of in the name of the respondent and his associates, for a much shorter time than it was agreed that it should run; and that by reason of the disobedience and fraud of the appellant, the defendant derived no benefit from the delivery of the check. A reply was filed putting in issue the allegations of the answer, and a trial had on the issues so made, resulting in a verdict and judgment for the respondent.

The respondent moves to dismiss the appeal for the reason that certain persons who were summoned as garnishees in the court below, and who filed answers to the garnishee process in that court, were not served with the notice of appeal. But these persons were in no sense parties to the action, and no right of theirs can be affected, however the case may be decided on this appeal. They have therefore no legal right to appear in this court, either to controvert or sustain the judgment appealed from, and consequently there was no necessity for serving them with the appeal notice.

On the merits of the controversy, the appellant first contends that the trial court erred in refusing to sustain a challenge to the sufficiency of the evidence, made at the close of the case on

Dec. 1907]

Opinion Per FULLERTON, J.

the ground that the evidence was insufficient to constitute a defense. The respondent testified to the facts substantially as he had set them out in his answer. It is true there is much in the record to contradict him, and it appears, also, that his statements were not at all times consistent, yet we think the probative effect of the testimony was for the jury, and that we would not be justified in saying that it did not constitute a defense, if taken as true. The challenge to the sufficiency of the evidence, therefore, was properly denied.

The report of the consulting engineer as to the condition of the vessel was sent to the respondent from San Francisco to Aberdeen in the form of a telegram. This report did not go into details as to the condition of the vessel, but consisted of only a short statement as to her general condition. The respondent was allowed to state, over the objection of the appellant, that this was not the character of report he expected, and to introduce as part of his evidence a written report made by this same engineer as to the condition of another vessel which the respondent had theretofore considered purchasing, as indicative of the character of the report he expected on this one. It was not shown by the evidence that the appellant agreed to procure a report as full and complete as the former report, or that it ever knew of its existence, nor did it appear that the appellant dictated or had any control over the report sent. Manifestly it was error, under these circumstances, to admit these statements and this report in evidence. The jury undoubtedly were led to believe that the appellant had violated its agreement in this regard, when in fact it had, in so far as the respondent's evidence made clear that duty, fully complied therewith. The respondent argues that this, conceding it error, was not prejudicial, but we think it highly so for the reason that it must have misled the jury. When the court ruled that it was a material circumstance, the jury, owing to the positive nature of the evidence, were bound, if they gave it consideration at all, to charge the appellant with the failure to furnish a more complete report.

The respondent in its answer set up a counterclaim in damages against the appellant; pleading his cause of action in the following language:

"And by reason of the wrongful, careless and negligent acts of the said plaintiff, as set forth in said affirmative defense, and in each and every paragraph and sub-divisions thereof; and on account of each and every of such reasons, this defendant was induced to believe and did believe that he had a *bona fide* contract or agreement with the Oregon Coal and Navigation Company for the purchase of the said steamer 'M. F. Plant,' and acting upon such belief, this defendant expended a great amount of labor, time and money in the performance of his part of the agreement, which the said plaintiff falsely and fraudulently represented as existing, which expense, time and labor was so expended, given and performed by the defendant herein upon the strength in and faith given by this defendant to the said representations, acts and deeds of the said plaintiff; and that by reason of the failure of the said plaintiff to keep faith with this defendant, and to do and perform the acts and things necessary for and agreed by it to be performed, and by reason of its false representations made to this defendant in regard to matters intrusted to its care, custody and control, and by reason of the breach of confidence which this defendant imposed in the said plaintiff, this defendant has totally lost all and singular of his time and labor and money expended in the performance of his supposed contract, and this defendant has been damaged thereby in the sum of Fifteen Hundred (\$1,500) Dollars, and Fifteen Hundred (\$1,500) Dollars is a reasonable sum to be allowed this defendant as damages herein."

Under this allegation the respondent was permitted to recover his expenses incurred in entering into the contract, the cost of telegrams sent and received in regard thereto, and certain other items claimed to have been expended in an attempt to carry out the contract but which were lost to the respondent because of the acts of the appellant. This was error. The items claimed were items of special damage, not those usually flowing from the breach of a contract, and were not recoverable under the allegations of the answer.

Dec. 1907]

Statement of Case.

The testimony of A. L. MacLeod, objected to, was properly admitted. It tended, though somewhat indirectly, to establish one branch of the case; namely, that it was by reason of the failure of the appellant to comply with its agreement that the contract for the purchase of the vessel was not carried out.

For the errors noticed, the judgment appealed from is reversed, and the cause remanded for a new trial.

HADLEY, C. J., DUNBAR, and CROW, JJ., concur.

RUDKIN, J.—I concur in the judgment of reversal, but think judgment should be directed by this court in favor of the plaintiff.

MOUNT and ROOT, JJ., concur with RUDKIN, J.

[No. 6541. Decided December 18, 1907.]

THE STATE OF WASHINGTON, *Appellant*, v. GEORGE M.  
NETHERCUTT, *Respondent*.<sup>1</sup>

EXTORTION — THREATS — ELEMENTS OF OFFENSE — COMMON LAW OFFENSES. Under the common law, it was not an indictable offense to extort money by threatening to institute a criminal prosecution against the party defrauded, since the threat is not of personal violence or such as to overcome a firm and prudent man.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered March 6, 1906, dismissing a prosecution for the crime of extorting money by threats. Affirmed.

R. M. Barnhardt, Fred C. Pugh, and A. J. Laughon, for appellant.

George M. Nethercutt, for respondent.

<sup>1</sup>Reported in 92 Pac. 938.

PER CURIAM.—The following complaint, omitting formal parts, was filed against the defendant before one of the justices of the peace of Spokane county:

“That on or about the 20th day of August, 1905, and within one year next before the making of this complaint, at the county of Spokane, state of Washington, the said defendant, George M. Nethercutt, then and there being, did then and there unlawfully, feloniously, wilfully, maliciously and verbally threaten said Collin to accuse him, said Collin, of having committed the crime of bribery, with intent then and there and thereby to extort money and other pecuniary advantage from said Collin and to extort from said Collin a certain contract purporting to be a contract of employment by said Collin of said Nethercutt as and for the attorney at law and in fact of said Collin.”

The appellant was found guilty by the justice, and sentenced to pay a fine of \$100, and costs of prosecution. The cause was then removed to the superior court, where a motion to quash the complaint was interposed, on the ground that the facts charged did not constitute a crime. This motion was sustained, and from a judgment of dismissal the present appeal is prosecuted.

The only statute we have on the subject of extorting money by threats is Bal. Code, § 7086 (P. C. § 1591), which reads as follows:

“If any person, either verbally or by any written or printed communication, shall maliciously threaten any injury to the person or property of another, with intent thereby to extort money or any pecuniary advantage whatever, or to control the person so threatened to do any act against his will, he shall, upon conviction thereof be imprisoned in the county jail not more than one year nor less than one month, or be fined in any sum not exceeding five hundred dollars nor less than one hundred dollars.”

This section extends only to malicious threats to injure person or property, and the state concedes that the complaint fails to charge a crime thereunder. It contends, however, that

Dec. 1907]

Opinion Per Curiam.

the complaint charges a common law offense under Bal. Code, § 6774 (P. C. § 1545), which provides that, "For all offenses at common law which are not hereinafter defined by statute, the offender may be tried in the superior courts of this state." The respondent, on the other hand, contends that the complaint does not charge a common law crime, and that if it does the common law on the subject of threats has been superseded by the above section of the code. The treatises of men learned in the law and the judicial records of the courts of justice in England are the repositories of the common law. When we look to these sources for a definition of the crime of extortion by threats we find little to aid us.

"So much doubt was entertained as to the law on this subject that statutory provisions have been made in *England* and in many of the *United States* which make it a distinct offense to extort money by threats of accusation of felony." 24 Am. & Eng. Ency. Law (2d ed.), p. 1001.

An examination of the English cases and of the text books tends strongly to confirm the above statement. In *Queen v. Woodward*, decided by Lord Holt, C. J., in 1707, it was held that,

"Every extortion is an actual trespass, and an action of trespass will lie against a man for frightening another out of his money. If a man make use of a process of law to terrify another out of his money, it is such a trespass as an indictment will lie for." 11 Mod. 137.

About a century later the same question was considered at length by the court of King's Bench in the *King v. Southerton*, 6 East. 125, where Lord Ellenborough, C. J., said:

"To obtain money under a threat of any kind, or to attempt to do it, is no doubt an immoral action; but to make it indictable, the threat must be of such a nature as is calculated to overcome a firm and prudent man. Now the threat used by the defendant, at its utmost extent, is no more than that he would charge the party with penalties for selling medicines

without a stamp. That is not such a threat as a firm and prudent man might not and ought not to have resisted."

And in reference to the case of the *Queen v. Woodward*, the learned judge said:

"Then, what authority is there for considering these as offenses at common law? The principal case relied on is, that of the *Queen v. Woodward* and others, which was, where the defendants, having another man in their actual custody at the time, threatened to carry him to gaol, upon a charge of perjury and obtained money from him under that threat, in order to permit his release. Was not that an actual duress, such as would have avoided a bond given under the same circumstances? But that is very unlike the present case which is that of a mere threat to put process in a penal action in force against the party. The law distinguishes between threats of actual violence against the person, or such other threats as a man of common firmness cannot stand against and other sorts of threats."

Again,

"But this is a case of threatening, and not of deceit: And it must be a threat of such a kind as will sustain an indictment at common law; according to one case, either attended with duress; or according to others, such as may overcome the ordinary free will of a firm man, and induce him from fear to part with his money. The present case is not like any of those; it is a mere threat to bring an action which a man of ordinary firmness might have resisted."

This conclusion was concurred in by Grose and Lawrence, JJ. Under the authority of the case just cited, it is manifest that the complaint does not charge a common law offense. A reference to text books throws but little light on the subject under discussion. They contain the general statement that the extortion of money by threats was, or was not, indictable at common law, citing, the *Queen v. Woodward* or the *King v. Southerton, supra*.

We are therefore of opinion that the common law on the subject under consideration is so doubtful and uncertain that the respondent is entitled to the benefit of the doubt, and that the judgment should be affirmed. It is so ordered.

Dec. 1907]

Opinion Per HADLEY, C. J.

[No. 0744. Decided December 18, 1907.]

**T. HATCH, Respondent, v. EDWARD HALL et al., Appellants.**<sup>1</sup>

**SALES — CONTRACT — BREACH — SUBSTANTIAL PERFORMANCE.** An agreement by the vendor of a threshing machine that the same might be paid for by threshing all his grain until payment was completed is substantially performed, where the vendor, after threshing 15,000 bushels of his own grain, upon demand for a credit to that extent, offered to obtain for the vendees the threshing of 15,000 bushels of the same quality upon an adjoining farm, in lieu of his own, as a payment on the machine, where it is not shown that any special privilege would be derived from the threshing of his own, or that the vendees could have obtained the threshing on the adjoining farm but for such arrangement.

Appeal from a judgment of the superior court for Lincoln county, Warren, J., entered January 30, 1907, upon findings in favor of the plaintiff, after a trial upon an agreed statement of facts, in an action to foreclose a chattel mortgage. Affirmed.

*Merritt, Hibschman, Oswald & Merritt*, for appellants.

*W. E. Southard and Neal, Sessions & Myers*, for respondent.

**HADLEY, C. J.**—This is an action to recover judgment for an alleged balance due upon the sale of a certain threshing machine, and to foreclose a chattel mortgage which was given as security for the debt. The complaint demands judgment and foreclosure for \$916.86, but the defendants deny that any sum is owing. The parties stipulated in writing as to the facts, and agreed that the court might make its conclusions of law and judgment from such stipulated facts. The facts are as follows: During the summer of 1904, the defendants purchased of the plaintiff a threshing outfit for the sum of \$1,500. On the 22d day of October, 1904, there was still due to plaintiff upon said purchase price a balance of \$1,100;

<sup>1</sup>Reported in 92 Pac. 936.

and on said date the parties entered into an agreement in writing as follows:

“Wilbur, Washington, 10-22, 1904.

“It is agreed between T. Hatch and the Hall Bros. that they, the Hall Bros., do all of the threshing for Mr. Hatch till the threshing machine is paid for, he, Mr. Hatch, giving them three weeks’ notice, they reserving the right to pay in cash if they so wish, in place of doing the threshing for the payment of the machine.”

On the date of the above contract, for the purpose of securing the balance due for the machine, the defendants executed to the plaintiff a chattel mortgage upon a twenty horsepower compound traction engine, water tank, cook house, and other chattels. After said date and during the year 1904, the defendants with said threshing outfit threshed for the plaintiff six thousand three hundred and four bushels of wheat and seven hundred bushels of oats, at the agreed price of six cents a bushel, and the defendants thereby became entitled to a credit of \$420.24. In the year 1905 the plaintiff was the owner of many acres of wheat and oats which yielded, when threshed, about twenty thousand bushels. During that year plaintiff purchased a combined harvester, a machine which in one operation cuts and threshes grain. When the grain aforesaid became ripe, the plaintiff, by the use of his said combined machine, harvested and threshed a sufficient amount to yield fifteen thousand bushels, and before doing so he did not give the defendants any notice that he desired them to do any threshing during the year 1905. After he had harvested and threshed the amount aforesaid, the plaintiff notified the defendants that he desired them to thresh the remainder of the grain of which he was then owner, to wit, five thousand bushels. The defendants refused to do so unless the plaintiff would give them credit for the threshing price of the amount of grain which plaintiff had threshed with his combined machine. Plaintiff declined to do this, but thereupon offered to furnish the defendants the same amount of grain to thresh,

Dec. 1907]

Opinion Per HADLEY, C. J.

in the same locality and of the same quality as that which he had threshed with his own machine. The plaintiff made arrangements with the owner of the land adjoining his own to have the defendants thresh the grain on the said land, by which the plaintiff was to give the defendants credit for said threshing under the contract aforesaid, and make settlement therefor with the owner of the grain on said adjoining farm. The plaintiff at the same time gave the defendants notice that three weeks thereafter he desired that they should thresh the remainder of the grain which he then owned, and he gave them the privilege, if they so desired, to thresh fifteen thousand bushels on the said adjoining farm, or enough thereof so that, with plaintiff's five thousand bushels, the same would fully pay defendants' indebtedness to plaintiff, and they should receive credit therefor the same as if the grain had been owned by the plaintiff.

Defendants thereupon refused to thresh any grain whatever for the plaintiff, and notified him that they repudiated the contract and regarded the same as abandoned and at an end, by reason of the fact that the plaintiff had not given them an opportunity to thresh all of his grain during the said season of 1905. The plaintiff has not since offered the defendants any grain to thresh. The defendants have not since offered to thresh any for the plaintiff, and the defendants have not paid anything further upon the balance of said indebtedness. From the above stated facts the court concluded that plaintiff is entitled to recover judgment against the defendants for the balance of the purchase price of the threshing outfit, and that he is also entitled to have foreclosure of the chattel mortgage. Judgment was entered accordingly, and the defendants have appealed.

It is assigned as error that the court entered judgment against appellants in any sum whatsoever. It is contended that, when respondent threshed fifteen thousand bushels of his own crop without giving appellants an opportunity to

thresh the same, he thereby placed it beyond his power to comply with the contract, and became guilty of the first breach whereby the appellants are excused from further performance. While there may have been a technical breach on the part of respondent, yet it was proper for the court to find whether there had been a substantial offer to perform by respondent in accordance with the essence and spirit of the contract. We think there was, when we look to the object which the parties had in view when they made their contract. That object was the privilege of appellants to pay their debt by threshing grain instead of by payment in cash. It is true, the contract specified the grain of respondent as that which they might thresh, but it is not shown by the facts that there was any special advantage to appellants in the privilege of threshing respondent's grain over that of threshing the grain of others. Indeed, the stipulated facts may be said to expressly negative such idea, inasmuch as respondent offered the same quantity of grain, of the same quality, and upon an adjoining farm. It is not shown that appellants would have had the privilege in any event of threshing the grain upon the adjoining farm if respondent had not so arranged it. The facts therefore show that respondent offered appellants the full equivalent of the exact thing named in the contract. This was such a substantial compliance as did not excuse appellants from performing. *Washington Bridge Co. v. Land & River Imp. Co.*, 12 Wash. 272, 40 Pac. 982; *Hovey v. Pitche*, 13 Mo. 191; *Craig v. Weitner*, 33 Neb. 484, 50 N. W. 442; *Meincke v. Falk*, 61 Wis. 623, 21 N. W. 785, 50 Am. Rep. 157; *Novelty Iron Works v. Capital City Oatmeal Co.*, 88 Iowa 524, 58 N. W. 518; *Blitz v. Toovey*, 9 N. Y. Supp. 439; 7 Am. & Eng. Ency. Law (2d ed.), 145.

The exact thing named in the contract may not have been done, but the essence of the thing named, and about which the parties contracted, was done, and appellants reaped therefrom the real opportunity which the contract was intended to secure. When respondent thus tendered substantial perform-

Dec. 1907]

Statement of Case.

ance, appellants were not excused from performance. They owe a *bona fide* indebtedness for value which they have received, and they should not escape payment by reason of a mere technical breach by respondent from which it does not appear that appellants have suffered any actual damage or even inconvenience. When they wholly refused to perform in kind, as provided by the contract or otherwise, respondent became entitled to maintain this action for the recovery of the balance in money and for the foreclosure of the mortgage.

The judgment is affirmed.

FULLERTON, RUDKIN, MOUNT, CROW, and DUNBAR, JJ.,  
concur.

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[No. 6848. Decided December 18, 1907.]

ORVILLE E. LOVING *et al.*, Appellants, v. LIZZIE McPHAIL  
*et al.*, Respondents.<sup>1</sup>

TAXATION—FORECLOSURE AND SALE—DEFENSES—PAYMENT OF TAX. A tax deed, upon foreclosure of a delinquency certificate, is void, where, long before the date of delinquency, the owner sent the county treasurer more than enough money to pay all taxes, receipt for which was duly issued, and the certificate of delinquency was issued by mistake of the treasurer, and foreclosure and sale were had without actual notice to the owner.

Appeal from a judgment of the superior court for Douglas county, Steiner, J., entered January 15, 1907, upon sustaining a demurrer to the complaint, dismissing an action to set aside tax foreclosure proceedings and for the cancellation of a tax deed issued thereunder. Reversed.

M. J. Gordon, Charles A. Murray, and Sam B. Hill, for appellants.

W. J. Canton, for respondents.

<sup>1</sup>Reported in 92 Pac. 944.

HADLEY, C. J.—This is an action to have certain tax foreclosure proceedings declared void, and for the cancellation of the tax deed issued in pursuance of the foreclosure. The superior court sustained a demurrer to the complaint and the plaintiffs elected to stand upon their complaint, refusing to plead further. Judgment was thereupon entered dismissing the action, and the plaintiff has appealed.

For the purposes of the appeal, the facts stated in the complaint must be taken as established. They are essentially as follows: On the 20th day of May, 1899, the Adrian Irrigation Company, a corporation, became the owner of certain described real estate in Douglas county, Washington, and remained such owner until about May 15, 1902. On the last-named date said corporation conveyed the property to the appellants, by deed containing covenants of warranty against all incumbrances. Appellants thereby became the owners of the premises and have ever since been such owners. At all times since becoming such owners they have been in the possession, and they are now in possession, of the land.

About the 16th of April, 1902, said corporation was desirous of paying all taxes which at that time remained upon said premises. With the intention and for the purpose of freeing the premises from all liens for taxes thereon, the corporation upon said date caused a communication to be addressed to the treasurer of said Douglas county, in which it was stated that it was desiring to pay all taxes to that date, including the taxes for the year 1901, upon all the lands described in the communication, which included, among others, a description of the lands in question. Inclosed with the communication was the sum of \$140, and the letter stated to the treasurer that, if the sum inclosed was more than sufficient to pay all of the taxes mentioned, the treasurer should return the balance, together with receipts for the taxes. Thereafter and pursuant thereto, on or about the 18th day of April, 1902, the treasurer did make and sign receipts which were

Dec. 1907]

Opinion Per HADLEY, C. J.

by him represented to be receipts for all taxes upon said premises up to and including the year 1901. At the same time he furnished a statement in writing, including the description above mentioned, and reciting therein that he had received \$126.44 in full payment of taxes upon all lands in said statement described, including the lands here involved.

Thereafter, notwithstanding said payment and receipt, and on or about the 27th day of June, 1904, the treasurer of said county issued what purported to be a certificate of delinquency to Douglas county for unpaid taxes upon the premises here concerned, for the sum of \$1.78, and also filed an application for the foreclosure of the lien of the certificate. Judgment of foreclosure was rendered and the treasurer sold the land to the respondent Lizzie McPhail, to whom he executed a tax deed. The said respondent and her husband and correspondent are asserting claim of title under said tax deed, which claim casts a cloud upon the title of appellants. The appellants paid said irrigation company valuable consideration for the lands at the time of their purchase from the company, and made inquiry as to whether the taxes were paid. They were shown the aforesaid statement of the treasurer, on which it appeared that all the taxes had been paid. Appellants had no actual notice of the tax foreclosure proceedings or of the delivery of the treasurer's said deed until long after the deed had been recorded in the auditor's office of Douglas county. In purchasing the property the appellants relied fully upon the effort that had been made by their grantor to pay all taxes upon the premises, and upon the receipts and statements made by the treasurer of said county as aforesaid. If they had known that there were any such unpaid taxes they would have paid them long prior to the time said certificate of delinquency was issued. They have ever been and are ready and willing to pay all taxes which appeared to be assessed against said premises, with interest, penalties, and costs, and would have paid the same but for the reasons above stated.

The respondents paid \$6.66 at the time they received their tax deed, and forty-eight cents of subsequent taxes. The whole amount of all payments, together with interest, does not exceed \$9. Prior to the commencement of this action, appellants tendered to respondents the sum of \$9 in full payment of all taxes, interest, penalties, and costs paid by them, and demanded from them a quitclaim deed to said premises, but the same was refused. The tender was kept good by bringing it into court.

The only question presented by the appeal is the sufficiency of the foregoing facts to support the cancellation of the tax deed and the removal of the cloud created by the tax foreclosure proceedings. We think the facts stated are amply sufficient to warrant the relief asked. The property holder made an effort in good faith to pay all taxes upon the property long before there was any delinquency, and was clearly prevented from doing so by the mistake or fault of the officer charged with the duty to collect the taxes. More than enough money was placed in the treasurer's hands to pay all taxes, and no further duty rested upon the property holder. It was the duty of the officer to apply the funds to the extent of the full satisfaction of the taxes. Such an effort by the property owner to pay taxes is the legal equivalent of payment, insofar as to discharge the lien and bar a sale for nonpayment. This court so held in the recent case of *Bullock v. Wallace*, 47 Wash. 690, 92 Pac. 675. The essential questions here involved are discussed in the case cited, and on the authority of that case this judgment must be reversed.

The judgment is reversed, and the cause remanded with instructions to overrule the demurrer to the complaint.

RUDKIN, MOUNT, CROW, DUNBAR, and ROOT, JJ., concur.

Dec. 1907]

Syllabus.

[No. 7025. Decided December 18, 1907.]

THE STATE OF WASHINGTON, *Respondent*, v. JULIUS  
MARFAUDILLE, *whose true name is* EUGENIO  
BASTIANELLO, *Appellant*.<sup>1</sup>

JURY—EXAMINATION—BIAS. Upon a prosecution for a homicide, committed by rigging a spring gun in a trunk, the defendant is entitled to ask veniremen, upon their *voir dire*, whether the fact of a death from such acts would create any prejudice or bias against the defendant, and it is prejudicial error to sustain objections thereto.

HOMICIDE—JUSTIFICATION—DEFENSE OF PROPERTY. In a prosecution for a homicide committed by rigging a spring gun in a trunk, it is error to assume that the law prohibited the setting of a spring gun except when necessary to prevent a capital crime; since homicide for the prevention of any forcible and atrocious crime is justifiable.

SAME—MURDER IN SECOND DEGREE—INTENT AND MALICE—QUESTION FOR JURY. In a prosecution for a homicide by the rigging of a spring gun in a trunk, it is error to sanction the prosecuting attorney's statement that the defendant would be guilty of murder in the second degree, if death resulted from his act in setting a spring gun, and that the same would be a question of law for the court; since the elements of both malice and intent must be determined by the jury.

SAME—EVIDENCE—WARNING OF SPRING GUN—ADMISSIBILITY. In a prosecution for homicide by the rigging of a spring gun in a trunk, evidence that the defendant warned the deceased of the gun, while not a defense unless deceased deliberately attempted suicide, might be material on the question of malice.

CRIMINAL LAW — REPUTATION — DEFENDANT — EVIDENCE. Upon a prosecution for homicide, evidence that the defendant had never before been arrested or accused is inadmissible to establish his general reputation for peace and quiet.

HOMICIDE—INTENT—EVIDENCE—OFFER OF PROOF. Upon a prosecution for a homicide by the rigging of a spring gun, defendant's offer to prove that he did not intend to kill the deceased is inadmissible, since any intent was necessarily general and would not be disproved by intent as to any particular person.

<sup>1</sup>Reported in 92 Pac. 939.

Appeal from a judgment of the superior court for King county, Frater, J., entered February 2, 1907, upon a trial and conviction of the crime of murder in the second degree. Reversed.

*Joseph M. Glasgow*, for appellant.

*Kenneth Mackintosh* and *George F. Vanderveer*, for respondent.

RUDKIN, J.—The appellant was convicted of the crime of murder in the second degree, and prosecutes this appeal from the judgment rendered against him.

The facts, so far as deemed material to a proper understanding of the questions presented for decision, are as follows: For some time prior to the 4th day of September, 1906, the appellant occupied a room in a lodging house, of which the deceased was proprietress, in the city of Seattle. In this room he kept a trunk which contained a concertino and some articles of personal property of small value. A spring gun was so arranged or rigged within the trunk that it would be discharged into the body of any person who might attempt to open it. On the above date the deceased and another woman entered the appellant's room, during his absence therefrom, for the purpose of making the bed. While in the room the deceased found the key to the trunk and proceeded to open it. In so doing she was evidently inspired by curiosity only. As she opened the trunk the gun was discharged and the ball entered her breast, causing almost instant death. The appellant has assigned a great many errors in support of his appeal, but many of these assignments present the same general question, arising in a different form or at a different stage of the proceedings, and we will not attempt to discuss the several assignments in detail. The appellant propounded substantially the following question to a number of the jurors on their *voir dire* examination:

Dec. 1907]

Opinion Per RUDKIN, J.

"If it should appear here in evidence that the defendant put a spring gun, or gun so rigged that it would be discharged in the opening of a trunk, this trunk which he kept in his room, and that some one was killed by opening the trunk, going into the trunk, would that fact create in your mind any prejudice or bias against the defendant that would make it so that you could not sit as a fair and impartial juror in this case?"

To this and other questions of like import, an objection was interposed and sustained. The question would seem entirely proper, and why the objection was sustained we are not advised. Certainly every litigant has a right to have his cause tried before a jury composed of men who have no undue bias or prejudice against him, his cause, or his defense. 24 Cyc. 280. In *Naylor v. Metropolitan St. R. Co.*, 66 Kan. 407, 71 Pac. 835, one of the jurors stated on his *voir dire* examination that he was prejudiced against the case of a nonresident who prosecuted an action for damages in the state of Kansas, when such action might have been prosecuted by the plaintiff in his own state. In reversing the judgment for error in denying a challenge for cause, the court said:

"It cannot be doubted that plaintiff has the constitutional right to have his cause tried by a jury in the courts of this state. He also has the right to have the jury empaneled to try his cause composed of men whose minds are unbiased and unprejudiced against either himself or his cause of action. Against the theory of the present jury system there may be plausible argument made, but against the practice in all courts of requiring an unprejudiced jury in the trial of jury cases no argument can be made. In this all the authorities agree."

We know from experience that men frequently entertain a prejudice against particular actions or particular defenses, and such prejudice if strong enough will of necessity disqualify them for jury service in such cases. We do not say that an affirmative answer to the question propounded would necessarily disqualify the jurors, but the appellant had an un-

questionable right to inquire into the state of their minds in order that he might challenge for cause, or intelligently exercise his right of peremptory challenge.

In his examinations of jurors, the attorney for the state propounded the following question:

"If the court should instruct you that a man has no right to kill another person either directly, as by shooting him with a gun held in his hand, or indirectly, as by setting a spring gun for him, except when necessary to prevent the commission of a capital crime—a crime punishable by death—would you be willing to accept that as the law of this case and be guided and governed by that instruction?"

The court overruled an objection interposed to this question and expressly approved the rule of law embodied therein. The ruling of the court in this regard finds support in the decision of this court in *State v. Barr*, 11 Wash. 481, 39 Pac. 1080, 48 Am. St. 890, 29 L. R. A. 154, but the rule there announced finds little support in the authorities generally, and none whatever in the common law. In *State v. Moore*, 31 Conn. 479, the court said:

"The class of crimes in prevention of which a man may, if necessary, exercise his natural right to repel force by force to the taking of the life of the aggressor, are *felonies* which are committed by *violence and surprise*; such as murder, robbery, burglary, arson, breaking a house in the day time *with intent to rob*, sodomy, and rape. Blackstone says: 'Such homicide as is committed for the *prevention* of any forcible and atrocious crime is justifiable by the law of nature; and also by the law of England as it stood as early as the time of Brackton;' and he specifies, as of that character, those which we have enumerated. No others were specified by Hale or Hawkins, who wrote before him on the Pleas of the Crown, or have been specified by any writer since. Mr. East, in his Pleas of the Crown, and Mr. Foster, from whom Judge Swift quotes the law on this subject in his Digest (vol. 2, p. 283), states the rule thus: 'A man may repel force by force in defense of his person, habitation, or property against one who manifestly intends or endeavors by violence and *surprise* to commit a known felony, such as murder, rape, robbery, arson,

Dec. 1907]

Opinion Per RUDKIN, J.

burglary, and the like, upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger, and if he kill him in so doing it will be justifiable self defense:’ 1 East P. C. 271; Foster’s Crown Law, 259. Neither of these writers specify any other crimes than those enumerated, and both except from the list simple theft, and even an attempt to pick a pocket.”

With the rule thus announced, substantially all the authorities are in accord. 21 Cyc. 798; Wharton, Homicide (3d ed.), p. 763; 1 Bish. Crim. Law, § 849. In the *Barr* case the court assumed that the reason for the common law rule is found in the fact that all the felonies above enumerated were punishable by death. We apprehend, however, that the true reason for the rule is stated by the court in *United States v. Gilliam*, Fed. Cas. No. 15,205a:

“The law is that a man may oppose force with force in defense of his person, his family or property against one who manifestly endeavors by violence to commit a felony, as murder, robbery, rape, arson or burglary.” *In all these felonies, from their atrocity and violence, human life either is, or is presumed to be in peril.*”

Of course the converse of the rule is equally well established and a person has no right to take human life directly or indirectly to prevent a mere trespass or a theft of property. In his opening statement to the jury, the attorney for the state said:

“I think in the course of this case in the securing of the jury you have already perhaps learned pretty much all about this case. It is a serious case, as all murder cases are, and it may surprise you somewhat that I should claim that it or any other murder case could ever be a simple case. But it is my opinion, gentlemen, that there will be practically no question in this case for you to decide; that the only question in this case is a question of law which the court will decide for you, and you, gentlemen, have all told me that you would, and have taken an oath that you would, accept his decision. . . . It is the theory of the state, and we will ask the court to instruct accordingly, and we believe that the court will in-

struct you accordingly, that a man has no right,—that a man is guilty of murder in the second degree when he sets a trap gun or spring gun loaded with powder and ball and arranged in such a way that it will be discharged by any person who opens a trunk, for instance.”

The court overruled an objection interposed to this statement, thereby giving at least its implied sanction to the views expressed by the prosecuting officer. The state again maintains that this statement of its attorney is in accordance with the decision of this court in *State v. Barr*, *supra*. Such is not the case. In the *Barr* case the defendant contended for one extreme view, viz., that he had a lawful right to maintain a spring gun for the protection of his property, and that the court should have so charged the jury. In this case the state goes to the other extreme, and contends not only that the appellant had no such right, but that he is guilty of the crime of murder in the second degree because a homicide resulted from his act in so doing. No such rule of law was announced in the *Barr* case. It was there expressly ruled that the claim of the defendant, under the circumstances, presented a mixed question of law and fact. The court did intimate that: “The court might have been justified in holding that the defendant did that which he had no right to do;” but even that statement falls far short of a declaration that the defendant would be guilty of the crime of murder in the second degree. The latter crime in this state includes the elements of both malice and intent, and these under any and all circumstances are questions of fact to be determined by the jury. The court in such cases should instruct when a defendant may and when he may not take human life in defense of person or property, and allow the jury to apply the law to the facts as they may find them. The court correctly ruled that the appellant had no greater right to take the life of the deceased by indirect means than he would have had to take it by direct means under the same circumstances, if personally present. *State v. Moore* and *United States v. Gilliam*, *supra*; 21 Cyc. 831.

Dec. 1907]

Opinion Per RUDKIN, J.

The appellant offered to prove that he had warned the deceased in relation to this gun, but the testimony was rejected and the nature of the notice or warning given does not appear in the record. Such warning or notice would not constitute a defense, unless it were brought home to the deceased in such a manner that her act in opening the trunk was a deliberate attempt on her part to take her own life. But, if the appellant warned or notified the only person who had a lawful right to go to his room, the testimony might have a material bearing on the question of malice and should have been received on that issue.

The appellant offered to prove, by his own testimony, that he had never before been arrested for or accused of crime, but the offer was rejected. If the appellant was unable to prove his general reputation for peace and quiet in the usual way, because of his short residence in the community, that was his misfortune and cannot change the rules of evidence. If it was competent for him to prove that he had never been arrested or accused, it would be equally competent for the state to prove that he had been, and such testimony would violate every right of the accused.

The appellant further offered to prove that he did not intend to kill the deceased. It is always competent for a person accused of crime to give testimony as to his intentions, where the question of intent is involved in the charge against him, but in this particular case the intent was necessarily general until it was made specific by the killing of the deceased, and in such cases the testimony as to the intent should be equally general. To prove that he did not intend to kill a particular person, under the circumstances of this case, would tend to confuse rather than enlighten the jury, and the offer was properly rejected.

This opinion has already reached an inordinate length, but we think that the foregoing discussion disposes of all questions that are likely to arise on a retrial. The use of spring guns in defense of property is not to be encouraged or commended,

but when a person is so unfortunate as to cause the death of another through such an agency he is entitled to a fair and impartial trial under proper declarations of the law, and to that end the judgment of the court below is reversed.

HADLEY, C. J., FULLERTON, MOUNT, and CROW, JJ., concur.

DUNBAR and ROOT, JJ., took no part.

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[No. 6856. Decided December 20, 1907.]

CARRIE ELLEN COZARD, *Appellant*, v. MILES C. COZARD,  
*Respondent*.<sup>1</sup>

APPEAL—RECORD—ADMISSION OF EVIDENCE. Prejudicial error cannot be claimed in admitting in evidence a letter, where the same is not made part of the record on appeal.

DIVORCE—ADULTERY—CONDONATION. Where condonation of acts of adultery was conditional, a breach of the condition works a revival of the offense.

SAME—CUSTODY OF CHILDREN. In granting a divorce on the ground of adultery of the wife, a decree granting the custody of the children to the husband is warranted where the wife's conduct showed that she was not a proper person to have their custody.

SAME—DECREE—AWARD OF COMMUNITY PROPERTY. Upon granting a divorce to a husband and awarding him the custody of four children, it is not an abuse of discretion to award to him one-half of the community property, valued at \$2,500, and one-half to the children, he to pay the wife \$250.

SAME—SUPPORT OF CHILDREN. A wife, divorced on the ground of adultery, cannot complain that the court had no power to award one-half of the community property to four minor children, whose custody was awarded to the husband, since the court could have awarded it to the husband for their support.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered February 23, 1907, upon

<sup>1</sup>Reported in 92 Pac. 935.

Dec. 1907]

Opinion Per RUDKIN, J.

findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action for divorce. Affirmed.

*Delameter & Blake*, for appellant.

*E. O. Connor*, for respondent.

RUDKIN, J.—The plaintiff, in the court below, instituted an action for divorce against the defendant on the ground of cruel treatment and personal indignities rendering life burdensome. The defendant denied the allegations of cruel treatment and personal indignities, and by cross-complaint sought a divorce from the plaintiff on the ground of adultery and cruel treatment and personal indignities on her part. The court found that the allegations of the complaint were not proved; that the allegations of the cross-complaint were proved; that the plaintiff was not a fit or proper person to have the care, custody and control of the four minor children of the marriage, of the ages of 15 years, 13 years, 11 years, and 6 years, respectively, and awarded the defendant a divorce on his cross-complaint, together with the care, custody and control of the four minor children, and one-half of the community property. The other half of the community property was awarded to the children, and the defendant was directed to pay to the plaintiff forthwith the sum of \$250. From this judgment the plaintiff has appealed.

The first contention is that the court erred in admitting in evidence a certain letter claimed to have been written by the appellant. Neither the letter nor its contents is made a part of the record, and we are unable to say that its admission was prejudicial, even though we should be of opinion that it was improper. The refusal of the court to strike testimony relating to certain acts of adultery, which had been condoned by the respondent, is the next error assigned. While it appears that there was in fact and in law a condonation of the offense referred to, yet such condonation was conditional only, and we think a breach of the condition was clearly shown. Such

breach works a revival of the original offense and permits of a divorce therefor. 14 Cyc. 637.

Insufficiency of the evidence to sustain the findings of the court on the charges of adultery is the subject of the next assignment. When all the testimony, direct and circumstantial, is considered we think it points unerringly to the conclusion reached by the trial court, and we deem it unnecessary to review the evidence in this opinion. The ruling of the court in awarding the custody of the four minor children to the respondent is assigned as error, but, when we consider the conduct of the appellant during the last two years of her married life, her conduct in leaving her home and her children without any excuse or justification therefor, and her course of conduct after leaving her home, we think the trial court was fully warranted in finding that she was not a fit or proper person to have the care, custody or control of these minor children.

It is next contended that the court erred in allowing the appellant only the sum of \$250 out of the community property. It appears from the testimony that the entire community property was of the value of approximately \$2,500, and when we consider the respective merits of the parties and the burdens imposed upon the property for the benefit of the minor children, we are not prepared to say that there was an abuse of discretion in the matter complained of. It is finally contended that the court had no power to award one-half, or any portion, of the community property to the children. Had the court not awarded the property to the children directly it doubtless would have awarded it to the respondent for their support and maintenance. The appellant has therefore no ground of complaint, and we will not consider the abstract question presented.

We find no error in the record and the judgment is affirmed. Neither party will recover costs on this appeal.

HADLEY, C. J., FULLERTON, CROW, DUNBAR, and MOUNT, JJ., concur.

Dec. 1907]

Opinion Per RUDKIN, J.

[No. 6908. Decided December 20, 1907.]

J. F. WITHIAM, *Appellant*, v. TENINO STONE QUARRIES,  
*Respondent*.<sup>1</sup>

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—OBEDIENCE TO COMMANDS—QUESTION FOR JURY. Where an employee was injured in the fall of a scaffold through the negligence of a foreman in ordering him to knock a brace loose from the scaffold, whether obedience to the command was so hazardous as to preclude a recovery was for the jury, and their verdict is conclusive.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered April 10, 1907, upon sustaining defendant's motion for judgment notwithstanding the verdict, in an action for personal injuries sustained by an employee by falling from a scaffold. Reversed.

*Brooks & Bartlett*, for appellant.

*Charles A. Riddle*, for respondent.

RUDKIN, J.—On the 1st day of September, 1906, the plaintiff in this action was injured by falling from a scaffold while in the employ of the defendant on the high school building in the city of Walla Walla, then in course of construction. At the time of receiving the injuries complained of, the building had advanced to about the second story and was ready for the cornice. Stones furnished by the defendant for window-caps were being put in place by means of a derrick. To aid in this work a scaffold theretofore erected around the outside of the building was used by the workmen. This scaffold consisted of uprights 24 feet in length extending from the ground six feet distant from the building. Ledgers were nailed to these uprights, upon which footlocks rested extending from the building. The planking on which the workmen stood were laid on these footlocks, and the scaffold was held in place by

<sup>1</sup>Reported in 92 Pac. 900.

braces nailed to the uprights above and to the window frames below. The plaintiff had worked on the building in one capacity or another from the time construction work commenced up to the time of the accident, and had assisted from time to time in the construction of the scaffold upon which he was standing at the time of his fall. Other braces had been removed from time to time prior to the removal of the brace which caused the scaffold to collapse. The plaintiff thus describes the manner in which he received his injuries:

“Q. Just state to the jury in your own way the manner in which you were injured and under whose instructions you were acting at the time you were so injured? A. Under Mr. Murray’s instructions. I was outside of the building on the scaffold, and he was inside; there was a wall between us, and we were about to hoist a window-cap up to set it, and he handed me a hammer and told me to knock the brace loose from that scaffold; I did so and handed him back the hammer and started to go back through the window on the inside, and the scaffold fell with me, letting me down to the ground.”

The act of the foreman in directing the plaintiff to knock the brace loose is the sole ground of negligence charged in the complaint. The case was submitted to a jury and a verdict returned in favor of the plaintiff in the sum of \$1,000. The court, on motion of the defendant, directed a judgment in its favor, notwithstanding the verdict, and from that judgment the present appeal is prosecuted.

The respondent relies for an affirmance of the judgment on the rule announced by this court in *Anderson v. Inland Tel. etc. Co.*, 19 Wash. 575, 53 Pac. 657, 41 L. R. A. 410, and other like cases, which in substance is as follows:

“In a case where the servant is one of mature age and experience, as in this case, the law never imposes the duty on the master of becoming eyes and ears for his servant, where there is nothing to prevent the servant from using his own eyes and ears to avoid danger. . . . The law requires that men shall use the senses with which nature has endowed them; and, when without excuse one fails to do so, he alone must suffer

Dec. 1907]

Opinion Per RUDKIN, J.

the consequences, and he is not excused where he fails to discover the danger if he made no attempt to employ the faculties nature has given him."

That rule is no doubt correct where the servant is *pro tempore* his own master and is under obligation to look after his own welfare and safety. But where the servant is acting under a specific command from his master, or the master's representative, a different rule applies. In the latter case the rule is thus stated in § 439 of Labatt on Master and Servant:

"In other cases the extent of the servant's right of action is indicated by a restrictive form of statement, and he is said to be entitled to obey a specific command of his superior without incurring thereby the imputation of contributory negligence, unless the execution of that command involves a hazard to which no ordinarily prudent person would have subjected himself; or unless a reasonably prudent person in his situation and with his knowledge of the danger would not have obeyed the command; or unless the danger was so 'apparent,' or 'obvious,' or 'clear,' or 'manifest,' or 'glaring,' or 'imminent' that a person of that average prudence and intelligence whose hypothetical conduct is the test of the existence or absence of negligence would have declined, under the given circumstances to have complied with the order. In other words, if a danger is not so absolute or imminent that injury must almost necessarily result from obedience to an order, and the servant obeys the order and is injured, the master will not afterwards be allowed to defend himself on the ground that the servant ought not to have obeyed the order."

See, also, Wood, Law of Master and Servant, §§ 387 *et seq.* This rule had been repeatedly approved by this court. *Christianson v. Pacific Bridge Co.*, 27 Wash. 582, 68 Pac. 191; *Goldthorpe v. Clark-Nickerson Lumber Co.*, 31 Wash. 467, 71 Pac. 1091; *Grout v. Tacoma Eastern R. Co.*, 33 Wash. 524, 74 Pac. 665; *Gaudie v. Northern Lumber Co.*, 34 Wash. 34, 74 Pac. 1009; *Crow v. Northern Pac. R. Co.*, 45 Wash. 605, 88 Pac. 1022.

The only question in this case therefore is, was the danger so apparent and imminent that a man of average prudence and

intelligence would have refused to obey the master's command? The master of course is not now estopped to claim that the act of the servant was foolhardy and reckless, but, in view of his previous command, such a defense should be viewed with some suspicion and scrutinized with care. It is reasonable to assume that neither the appellant nor the foreman deemed the act overhazardous at the time, and evidently the jury did not so consider it. It seems to us that reasonable minds might well differ as to the danger that might result from the act which the appellant was directed to perform, and in such cases the jury's verdict is conclusive on the court, in so far as its right to direct a judgment is concerned.

The judgment of the court below is therefore reversed, and the cause is remanded for further proceedings.

HADLEY, C. J., DUNBAR, and CROW, JJ., concur.

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[No. 6929. Decided December 20, 1907.]

THE STATE OF WASHINGTON, *on the Relation of H. L. Tatum et al., Appellant*, v. E. A. FITZHENRY, *Clerk of the Superior Court for Clallam County, Respondent*.<sup>1</sup>

GARNISHMENT—JUDGMENT AGAINST GARNISHEE—PAYMENT INTO COURT—WHO ENTITLED TO. Under Bal. Code, § 5403, upon judgment against a garnishee, and payment of the same to the clerk of the court, the judgment and payment inures to the benefit of the successful party in the principal action, and the plaintiff is not entitled to the fund in court until after recovery of judgment against the defendant.

Appeal from a judgment of the superior court for Clallam county, Still, J., entered January 26, 1907, denying an application for a writ of mandate to compel payment to relators of a deposit in court by the garnishee defendants. Affirmed.

<sup>1</sup>Reported in 92 Pac. 898.

Dec. 1907]

Opinion Per RUDKIN, J.

*Shank & Smith*, for appellant.*Trumbull & Trumbull*, for respondent.

RUDKIN, J.—This is an appeal from a judgment denying an application for a writ of mandate. The application for the writ set forth substantially the following facts: That on the 21st day of October, 1904, in a certain action then pending in the superior court of Clallam county, wherein the appellants herein were plaintiffs and W. A. Geist and others were defendants, and the Niagara Fire Insurance Company of the city of New York and the London Assurance Corporation were garnishee defendants, judgment was given and entered in favor of said plaintiffs and against said garnishee defendants in the sum of \$1,150, with interest and costs of suit; that said judgment was thereafter affirmed by this court; that on the 3d day of December, 1906, the garnishee defendants satisfied said judgment by paying the full amount thereof to the respondent clerk; that the appellants have made demand on said clerk for the money so paid in, and that such demand has not been complied with. That the demurrer to this application was properly sustained seems to us too apparent to admit of argument. Bal. Code, § 5403 (P. C. § 556), provides what disposition shall be made of moneys paid in by or collected from a garnishee. That section is as follows:

“Execution may be issued on the judgment against the garnishee herein provided for in like manner as upon any other judgment. The amount made upon any such execution shall be paid by the officer executing the same to the clerk of the superior court from which such execution was issued; and in cases where judgment has been rendered against the defendant the amount made on the execution shall be applied to the satisfaction of the judgment, interest and costs against the defendant. In case judgment has not been rendered against the defendant at the time execution issued against the garnishee is returned, any amount made on said execution shall be paid to the clerk of the court from which such execution

issued, who shall retain the same until judgment be rendered in the action between the plaintiff and defendant. In case judgment be rendered therein in favor of the plaintiff, the amount made on the execution against the garnishee shall be applied to the satisfaction of such judgment and the surplus, if any there be, shall be paid to the defendant. In case judgment be rendered in such action in favor of the defendant, the amount made on said execution against the garnishee shall be paid to the defendant."

The application in this case failed to show that the appellants had recovered judgment against the defendants in the principal action, and their right to demand or receive from the clerk the money paid in by the garnishees was dependent upon that judgment and not upon the judgment against the garnishees. The latter inures to the benefit of the successful party in the principal action. An application of this kind therefore fails to state a cause of action unless it shows that the plaintiff in the principal action has recovered judgment against the defendant in the principal action, and the amount thereof.

The judgment of the court below is affirmed.

HADLEY, C. J., DUNBAR, CROW, MOUNT, and FULLERTON, JJ., concur.

Dec. 1907]

Opinion Per RUDKIN, J.

[No. 6962. Decided December 20, 1907.]

THE STATE OF WASHINGTON, *Respondent*, v. JOHN F. JONAS,  
*Appellant*.<sup>1</sup>

RAPE—EVIDENCE—CORROBORATION—SUFFICIENCY. There is sufficient corroborative evidence, within Laws 1907, p. 396, requiring a prosecutrix for rape to be corroborated by evidence which "tends to convict the defendant of the commission of the offense," where, in addition to evidence of similar acts during several years, circumstances and conditions showing opportunity at the time in question, and testimony of a physician establishing the fact of intercourse for a considerable period, it appeared that the defendant advised his wife to induce the prosecuting witness to leave the state, and his admissions showed that he had often taken liberties with the person of the prosecutrix.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered July 8, 1907, upon a trial and conviction of the crime of rape. Affirmed.

*Maurice A. Langhorne* and *John H. McDaniels*, for appellant.

*C. R. Hovey* (*H. W. Hale*, of counsel), for respondent.

RUDKIN, J.—The defendant was convicted of the crime of rape, and prosecutes this appeal from the judgment and sentence of the court. Insufficiency of the evidence to justify the verdict is the only error assigned. The appellant contends that the testimony of the female raped was not corroborated as required by the act of March 15th, 1907, Laws of 1907, page 396. That act provides as follows:

"No conviction shall be had for the offense of rape, or seduction, in this state upon the testimony of the female raped, or seduced, unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offense."

<sup>1</sup>Reported in 92 Pac. 899.

The complaining witness, on direct and cross-examination, testified to numerous acts committed by the appellant, running over a period of two or three years, any of which would constitute the offense charged in the information; but at the close of the state's case the court required the prosecution to elect upon which of these several acts it would rely for a conviction. The prosecution thereupon elected to rely upon a certain act committed at the section house at Thorpe on the 18th day of December, 1906. The following testimony is found in the record tending to corroborate the testimony of the female raped. (1) Testimony as to the circumstances and conditions surrounding the parties at the section house on the night of December 18th, and at other times when like offenses are alleged to have been committed. (2) Testimony of the physician who made a physical examination of the complaining witness, to the effect that she had had intercourse with some person or persons extending over a considerable period of time. (3) Testimony as to prior acts. (4) Testimony that the appellant dictated a letter to his wife advising her to induce the prosecuting witness to leave the state. (5) Testimony as to admissions or confessions made by the appellant.

It is probably true, as contended by the appellant, that some of the testimony above alluded to, while generally referred to as corroborative in this class of cases, is not such within the meaning of this statute, or at least is not sufficient corroboration. It has often been held that mere proof of acquaintance and opportunity will not satisfy the requirements of such a law. The testimony of the physician tended in no way to connect the appellant with the crime charged, and perhaps would not be sufficient corroboration under ordinary circumstances. The injured female cannot corroborate herself, and therefore her uncorroborated testimony as to other acts of intercourse does not tend to corroborate her as to the particular act charged, within the meaning of the law. But we think that the testimony tending to show that the appellant

Dec. 1907]

Opinion Per RUDKIN, J.

advised his wife to induce the prosecuting witness to leave the state, and his admissions or confessions that he had often taken liberties with the person of the complaining witness, and had committed acts which would constitute the crime of rape, though evidently not so understood by him, was amply sufficient to satisfy the requirements of the statute. *State v. Roller*, 30 Wash. 692, 71 Pac. 718; *State v. Wood*, 33 Wash. 290, 74 Pac. 380; *State v. Fetterly*, 33 Wash. 599, 74 Pac. 810; *State v. Markins*, 95 Ind. 464, 48 Am. St. 733; *Cruikshank v. Gordon*, 118 N. Y. 178, 23 N. E. 457; *Carpenter v. Willey*, 65 Vt. 168, 26 Atl. 488; *Waterhouse v. Rock Island Alaska Min. Co.*, 38 C. C. A. 281, 97 Fed. 466.

While the admissions or confessions did not expressly refer to the particular act upon which the state relied for a conviction, they did not in terms exclude that act. They certainly tended to convict appellant of the particular offense charged, and that is all the law requires. *Andrew v. State*, 5 Iowa 389; *State v. Forsythe*, 99 Iowa 1, 68 N. W. 446; *Crozier v. People*, 1 Parker Crim. Rep. (N. Y.) 453; Wigmore, Evidence, § 2064.

There is no merit in the contention that the complaining witness did not testify to acts constituting the crime of rape on the 18th day of December. While she did not detail what occurred that night, she did, in effect, by reference to what transpired on another occasion.

We find no error in the record and the judgment of conviction is accordingly affirmed.

HADLEY, C. J., DUNBAR, CROW, MOUNT, FULLERTON, and ROOT, JJ., concur.

[No. 7040. Decided December 20, 1907.]

CARL OLSON, *Respondent*, v. HUMBIRD LUMBER COMPANY,  
LIMITED, *Appellant*.<sup>1</sup>

MASTER AND SERVANT—NEGLIGENCE OF MASTER—PROXIMATE CAUSE—SAFE PLACE—FELLOW SERVANTS. In an action by an employee, injured on a log deck in a saw mill, the evidence tends to show that the injury was caused, to some extent, by reason of failure to furnish a safe place to work, rather than by negligence of a fellow servant, where it appears that a steam kicker had torn a hole in the floor, into which the plaintiff stepped and was thrown down, causing him great pain at that time, and that in attempting to release him, the operator put the kicker in motion, after which it was discovered that his leg was broken.

SAME—PLEADING—AMENDMENTS TO CONFORM TO PROOF—APPEAL—REVIEW—DISCRETION. In an action by an employee whose complaint, relied particularly upon the negligence of a co-employee in putting in motion a steam kicker, after plaintiff's foot had become fast in a hole in the floor, it is discretionary to allow, upon terms, an amendment to the complaint to allege negligence in failing to provide a safe place to work, where the evidence made out a *prima facie* case of negligence as to the hole in the floor; and the same will not be reversed on appeal in the absence of a showing of abuse of discretion.

Appeal from an order of the superior court for Spokane county, Poindexter, J., entered February 9, 1907, granting plaintiff's motion for a new trial, in an action for personal injuries sustained by an employee in a sawmill. Affirmed.

*E. C. Macdonald* and *Donald F. Kizer*, for appellant, contended, that the proximate cause of the injury being the act of a fellow servant, the connection between the injury and the negligence as to the hole in the floor gave rise to no liability. *Dean v. Oregon R. & Nav. Co.*, 38 Wash. 565, 80 Pac. 842. If the person who started the kickers into motion had been a fellow servant with plaintiff, no recovery could be obtained against the defendant. *Millett v. Puget Sound Iron and Steel Works*, 37 Wash. 438, 79 Pac. 980; *Metzler v. Mc-*

<sup>1</sup>Reported in 92 Pac. 897.

Dec. 1907]

Opinion Per RUDKIN, J.

*Kenzie*, 34 Wash. 470, 76 Pac. 114; *Wilson v. Northern Pac. R. Co.*, 31 Wash. 67, 71 Pac. 713; *Grim v. Olympia Light & Power Co.*, 42 Wash. 119, 84 Pac. 635. Whether the act was that of a fellow servant must be determined by the laws and decisions of the state of Idaho, where the accident occurred. *Northern Pac. R. Co. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 958; *Stewart v. Baltimore etc. R. Co.*, 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537; *Sartin v. Oregon Short Line R. Co.*, 27 Utah 447, 76 Pac. 219; *Johnson v. Union Pacific Coal Co.*, 28 Utah 46, 76 Pac. 1089, 67 L. R. A. 506; *Larsen v. LeDoux*, 11 Idaho 49, 81 Pac. 600. Under the rule in Idaho, where the New York rule is followed, Blake and the plaintiff were fellow servants. *Snyder v. Viola Mining & Smelting Co.*, 3 Idaho 28, 26 Pac. 127; *Larsen v. LeDoux*, *supra*; *Donnelly v. San Francisco Bridge Co.*, 117 Cal. 417, 49 Pac. 559; *Weeks v. Scharer*, 111 Fed. 330. The lower court erred in granting a new trial because the act of Blake in moving the kickers was not within the scope of his employment but a wanton act on his part. 2 Labatt, Master and Servant, § 537; *Jones v. St. Louis etc. Packet Co.*, 43 Mo. App. 398; *Axtell v. Northern Pac. R. Co.*, 9 Idaho 392, 74 Pac. 1075; *Turner v. North Beach etc. R. Co.*, 34 Cal. 594; *Mendelshon v. Anaheim Lighter Co.*, 40 Cal. 657; *Brown v. Jarvis Engineering Co.*, 166 Mass. 75, 43 N. E. 1118, 55 Am. St. 382, 32 L. R. A. 605; *Hartford v. Northern Pac. R. Co.*, 91 Wis. 374, 64 N. W. 1033.

*B. M. Branford and Joseph McCarthy*, for respondent.

RUDKIN, J.—At the time of the injury complained of in this action, the defendant owned and operated a sawmill at Sand Point, Idaho. The mill was built on the bank or shore of Lake Pend Oreille, and the logs were brought into the mill from the lake over a logway. After the logs reached the mill or log deck they were rolled from the logway by means of an appliance known as a steam kicker. The kicker consisted of several iron bars about four feet in length situated a few feet

apart along the log deck. One end of the bars was attached to the machinery beneath the deck and the other end extended through the floor of the deck to the edge of the logway. The kicker was propelled by steam by means of levers located near the end of the log deck, and when set in motion moved with great force and velocity. The iron bars referred to were about one inch thick and four inches wide and worked through slots in the floor in the log deck from one and a half to two inches in width. Some considerable time before the accident complained of, one of these bars was bent and, in working back and forth through the slot in the floor, had worn a hole in the log deck large enough to admit a person's foot. On the 2d day of June, 1905, the plaintiff was in the employ of the defendant in its mill as an assistant to the edgerman. About 10 o'clock that night he was called to the log deck by the foreman of the mill to assist in rolling from the logway an unusually large log which the steam kicker was not powerful enough to move. About a dozen other employees assisted in this work. As the log moved from the logway the plaintiff stepped into the hole in the floor or bed of the log deck caused by the bent arm of the kicker, as above described, and became fast between the kicker arm and the floor so that he could not extricate himself. He thus describes the manner in which he received his injury:

"I just started and lifted at the same time the log started and then I tried to get my cant hook loose from the log, but could not hardly do it. At the same time I tried to do that, I took a step ahead and just slipped down in a hole in the floor there on the side of the kicker. I tried to pull my foot up but could not do it it was in so tight in there. The kicker came back and tightened up. Q. Did you fall down or stand up? A. Just held over to the side and fall on my arms. Q. You fell over on your arms? A. Yes, sir. Q. Did it pain you any at that time. A. Yes, sir, it pained me awfully. Q. Just tell the jury what was done next if you remember. A. Well, the next to do was somebody chopped out the floor a little there, and they were going kind of slow, so that after that he [referring to the foreman of the mill] started and used that steam

Dec. 1907]

Opinion Per RUDKIN, J.

feeder and the kickers came up and down again in full motion, and he used the kicker twice and the foot is standing down in the hole. After he used it twice I tried to pull out and somebody helped me, but we could not get it, and I noticed the bone was broken in the leg because I tried to pull it and I could twist it around in all directions. He raised the kicker once more and a few men were pulling my leg and the foot comes out with the kicker."

While the complaint alleged the defective condition of the log deck, the particular act of negligence which caused the injury, according to the allegations of the complaint, was the act of the defendant's foreman in operating the steam kicker for the purpose of releasing the plaintiff's foot from the hole in the log deck. Among other defenses interposed, the defendant averred that the negligent act complained of was the act of a fellow servant under the laws of the state of Idaho, which were specially pleaded in the answer. At the close of the plaintiff's testimony the defendant moved to discharge the jury and direct a judgment in its favor, for the reason that it appeared from all the testimony that the negligent act charged in the complaint was the act of a fellow servant. The plaintiff, on the other hand, asked leave to amend his complaint to conform to the testimony received at the trial tending to show that the injury was caused by a defect in the bed of the log deck and not by the act of the foreman Blake. After expressing some doubt as to the right of the plaintiff to amend, the court said:

"I will discharge the jury and give you an opportunity to present that portion of the evidence and I will consider your application to amend, and it will depend to some extent as to what the testimony in the case is upon that subject, so I will make the order to discharge the jury and take your application to amend under advisement."

Judgment was thereupon entered in favor of the defendant, but upon motion of the plaintiff the court thereafter granted a new trial. From the latter order the defendant has appealed.

In support of its appeal the appellant contends that the only act of negligence alleged or proved was the negligence of the

foreman of the mill in operating the steam kicker for the purpose of releasing the respondent's foot, and that such act was the act of a fellow servant for which the appellant is not liable. The record does not sustain this contention. It clearly appears from the testimony of the respondent, as quoted above, and from other testimony in the case, that the respondent was injured, to some extent at least, by reason of the defective condition of the bed of the log deck before the foreman took charge of or operated the steam kicker at all. Indeed, it may well be doubted whether there was any testimony tending to show that the respondent's injury was even augmented by the act of the foreman while attempting his release. The appellant's case would therefore be just as strong if based on the theory that there was no evidence of negligence on the part of the foreman as upon the theory that he was a fellow servant.

It clearly appears, however, that the testimony on the part of the respondent made out a *prima facie* case against the appellant for failure to furnish a reasonably safe place for its servants in the performance of their duties. Whether such negligence was sufficiently pleaded we need not inquire, because in the exercise of a sound discretion the court might well have permitted the complaint to be amended to conform to the facts proved, on such terms as it deemed just, and whether that discretion was exercised at the time the application was made, or on the application for a new trial, the ruling of the court is not subject to review here, unless an abuse of sound judicial discretion is made manifest, and no such showing is made or attempted. Inasmuch as the new trial was fully warranted on the ground above indicated, we do not deem it necessary to decide what the fellow servant law of our sister state of Idaho is or its application to the facts here presented.

The order granting a new trial is therefore affirmed.

HADLEY, C. J., FULLERTON, CROW, DUNBAR, and MOUNT, JJ., concur.

Dec. 1907]

Opinion Per RUDKIN, J.

[No. 7048. Decided December 20, 1907.]

THE STATE OF WASHINGTON, *on the Relation of Harriet F. Speckart, Appellant*, v. THE SUPERIOR COURT FOR THURSTON COUNTY, *Respondent*.<sup>1</sup>

CERTIORARI—ADEQUACY OF REMEDY BY APPEAL. There is no adequate remedy by appeal, and certiorari lies, where an administrator with the will annexed has been authorized to pay out \$500 per month to the widow of the deceased, and during six months has paid out over \$3,500 in costs of administration and other larger sums for other purposes.

EXECUTORS AND ADMINISTRATORS — ADMINISTRATION — NECESSITY. There is no justification for administration with the will annexed, in this state, thirteen years after the death of the testator, where he died in a sister state, and the widow was appointed executrix in that state, notice to creditors was duly given there, her accounts approved, and nothing remained to be done there except to distribute the estate according to the law of that state vesting the same in the devisees.

SAME—ALLOWANCE TO WIDOW. An allowance to a widow for support pending administration cannot be granted thirteen years after the death of the testator, after ample allowances in another state under proceedings which were not closed up by final distribution owing to the neglect of the widow.

Certiorari to review an order of the superior court for Thurston county, Linn, J., entered September 25, 1907, after a hearing on the merits, denying a petition to dismiss proceedings had in the probate of a will. Order reversed and proceedings dismissed.

*E. E. Heckbert, C. M. Idleman, and J. W. Robinson*, for relator.

*G. C. Israel and Frank C. Owings*, for respondent.

RUDKIN, J.—Adolph Speckart, a resident of Silver Bow county, Montana, died testate in that county on the 15th day

<sup>1</sup>Reported in 92 Pac. 942.

of February, 1893. His will was admitted to probate in the District Court of the Second Judicial District of Montana on the 6th day of March, 1893, and his widow, Henriette Speckart, was appointed executrix thereof, without bonds, as provided therein. All the property of the testator of whatsoever kind and wheresoever situate was devised and bequeathed to his widow and two children, share and share alike, and under the terms of the will the children became entitled to their respective shares as soon as they attained the age of majority under the Montana statute. The executrix duly qualified and entered upon the discharge of her duties. Notice to creditors was published, and under dates of June 1st, 1895, and June 6th, 1896, she filed annual reports, setting forth her receipts and disbursements on account of the estate, and showing that all debts against the estate had been paid in full. The accounts so rendered were settled, allowed and approved by the court. Other proceedings were had in the Montana court, but we deem it unnecessary to set them forth in this opinion. All the personal property belonging to the estate and a considerable portion of the realty were converted into money as early as 1899, under the direction and supervision of the Montana court. On the 24th day of July, 1890, a citation issued requiring the executrix to file an account on or before September 1st of that year, but the executrix having left the state no further proceedings were had.

On the 16th day of June, 1906, the resignation of the executrix was accepted by the Montana court, and Andrew J. Davis was appointed administrator with the will annexed, in her place and stead. In the summer of 1896, the executrix left the state of Montana, accompanied by her two children, and took up her residence in Germany. The funds belonging to the estate she took with her and deposited in German banks at interest in her own name. In the year 1901 she removed from Germany to San Diego, California, and continued to reside at the latter place until 1906.

Dec. 1907]

Opinion Per RUDKIN, J.

On the 26th day of May, 1906, Josey R. Speckart, son of the testator, and one of the devisees named in the will, petitioned the superior court of Thurston county for the probate of the will here, and asked that Leopold F. Schmidt be appointed administrator with the will annexed. After notice and a hearing the prayer of the petition was granted, and on the 18th day of June, 1906, Schmidt was appointed administrator, but through inadvertence the order admitting the will to probate was not entered until a later day. The administrator thus appointed duly qualified and filed an inventory of the estate. On the 15th day of October, 1906, an order was entered allowing the widow of the deceased the sum of \$500 per month for maintenance, beginning with the 19th day of June, 1906, and continuing from month to month thereafter. On the 10th day of January, 1907, the administrator filed his semi-annual account, and on June 24, 1907, his final account. On the 19th day of June, 1907, the relator, Harriet F. Speckart, daughter of the deceased, and one of the devisees named in the will, appeared specially in the estate matter, objected to the jurisdiction of the Thurston county superior court, and prayed that all orders and decrees made therein be reversed and annulled. The grounds of this petition will sufficiently appear in the course of the opinion. A hearing was thereafter had and on the 25th day of September, 1907, the prayer of petition was denied. An order to show cause why a writ of review should not issue was thereupon granted by this court, and the entire record is now before us on the return to the show cause order.

The first question for consideration relates to the remedy, the respondent contending that the relator has an adequate remedy by appeal, and that a writ of review or certiorari will not lie. If the court below has erroneously entertained jurisdiction of this administration proceeding, we do not think that the remedy by appeal is adequate. It appears from the return that the administrator has been authorized to pay an al-

lowance of \$500 per month to the widow of the deceased, and during the first six months of his administration has paid out upwards of \$3,500 in costs of administration. The schedules attached to the final account of the administrator have not been made a part of the return, so that we do not know what amount has been paid out in costs and disbursements during the period covered thereby, or how much may be disbursed in the future. It does appear, however, that about \$8,000 has been paid out and disbursed for one purpose or another, in addition to the \$3,500 above mentioned. An appeal from the orders directing or approving these several allowances or disbursements, if the orders are appealable at all, or an appeal from the order settling the final account or decreeing a distribution of the estate would not, in our opinion, be an adequate remedy. *In re Sullivan's Estate*, 36 Wash. 217, 78 Pac. 945.

On the merits, the relator contends that the court below was without jurisdiction, because the testator lived and died without the state and left no estate therein; because the estate sought to be administered upon was brought within the state more than thirteen years after the testator's death and had already vested in the devisees named in the will, and the administration was therefore sought upon the estate of the living rather than the dead, and for various other reasons we deem it unnecessary to discuss or set forth. The respondent, on the other hand, contends that the court had jurisdiction both under the statute and independent of the statute.

We do not deem it necessary to discuss the jurisdictional question, because the whole case is now before us for review, and we are convinced that no excuse, necessity, or justification for the administration has been shown. In fact the contrary clearly appears. All letters of administration are for purposes more or less temporary. The primary object is the collection of the assets and the payment of the debts of the decedent. The distribution of the residue among those thereto

by law entitled is only an incident, and when the primary object of administration is nonexistent, when all debts against the estate have been paid or barred, when the estate has become vested in those entitled thereto by law, and especially when thirteen years has been allowed to elapse after the death of the testator, no court should assume jurisdiction of the estate for the sole and only purpose of making a distribution thereof among those in whom the estate has already vested. This court has, in effect, so decided in many cases, and our decisions are in entire harmony with adjudications from other states. *Griffin v. Warburton*, 23 Wash. 231, 62 Pac. 765; *Murphy v. Murphy*, 42 Wash. 142, 84 Pac. 646, and cases there cited; *Wright v. Smith*, 19 Nev. 143, 7 Pac. 365; *Fisk v. Norvel*, 9 Tex. 13; *Granger v. Harriman*, 89 Minn. 303, 94 N. W. 869; *Flood v. Pilgrim*, 32 Wis. 376.

A cursory examination of the record will show the injustice of this proceeding. After having received an allowance of \$5,700 through the Montana court, the widow is here allowed \$500 per month, thirteen years after her husband's death, and this too, when the failure to close the estate years ago was due solely to her own neglect. No such allowance is contemplated or authorized by law. *Dale v. Hanover Nat. Bank*, 155 Mass. 141, 29 N. E. 371; *Jespersen v. Mech*, 213 Ill. 488, 72 N. E. 1114; *In re Dougherty's Estate*, 34 Mont. 336, 86 Pac. 38.

In the latter case the supreme court of Montana said:

"But it is urged that it appears that the widow has purposely delayed the settlement of the estate in order that she might consume the whole of it by means of her allowance. This contention presents the question: How long may the allowance continue? May it continue indefinitely? If the estate is insolvent, it continues for one year. Code Civ. Proc., § 2582. If it is not insolvent, the allowance is made to continue 'during the progress of the settlement of the estate.' Id. The policy of the law is that the affairs of estates shall be settled and the assets distributed as speedily as possible. The expression 'during the progress of the settlement of the

estate,' then, must be construed to mean, during the time reasonably necessary for that purpose. If so, the order, though regarded as a judgment, fixing a lien upon the assets of the estate must be presumed to have been satisfied when the time shall have arrived at which the estate may be settled; else the administrator may delay action until the whole estate is consumed and nothing be left to those who are entitled to a distributive share in its assets."

If the final account of the administrator should be approved as rendered, the cost of administration will approximate \$20,000. By reason of its pendency the relator is deprived of the use and enjoyment of her portion of the estate for an indefinite period, and is compelled to contribute \$6,000 or \$7,000 towards the expenses of what is at best an idle ceremony. Against such a proceeding under the forms of law, we think she has ample grounds to complain.

The record is now before us, and the issuance of a writ of review to bring it up is not required. For the reasons herein stated the order of the court below is reversed, and the cause is remanded with directions to dismiss the proceeding as prayed.

HADLEY, C. J., MOUNT, DUNBAR, CROW, FULLERTON, and ROOT, JJ., concur.

Dec. 1907]

Opinion Per DUNBAR, J.

[No. 6791. Decided December 20, 1907.]

**TENA BUTLER, *Appellant*, v. SUPREME COURT OF THE  
INDEPENDENT ORDER OF FORESTERS, *Respondent*.<sup>1</sup>**

CORPORATIONS—PROCESS—ACTIONS—VENUE—FOREIGN CORPORATION—HAVING NO AGENT IN STATE. LAWS 1901, p. 356, § 6, requiring beneficial associations to appoint the state insurance commissioner, at Olympia, their statutory agent upon whom service of process may be made, does not require that actions against them be commenced in Thurston county, when such an association has no office or agent in the state for conducting its general business; Bal. Code, § 4854, requiring actions against a corporation to be commenced in the county where it has an office or any person resides upon whom process may be served not applying in such a case.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered February 7, 1907, dismissing an action on a benefit insurance certificate, after a trial on the merits before the court without a jury. Reversed.

*Belden & Losey*, for appellant.

*M. C. King* and *Samuel R. Stern*, for respondent.

DUNBAR, J.—This action was brought by appellant to recover on a certain benefit certificate issued to one August Schneider, wherein appellant is named as the beneficiary. Service was made upon the defendant, a foreign corporation, on the 14th day of February, 1906, by leaving with M. C. King, the deputy supreme chief ranger and financial secretary, at Spokane, Washington, true copies of the summons and complaint. Afterwards service was made upon the commissioner of insurance, who, by the provisions of the statute of 1901 relative to beneficiary societies, is made the statutory agent for the purpose of service of process upon a foreign corporation or beneficiary society. The respondent appeared and, by way of answer, set out as its plea in abatement the fact that the superior court of Spokane county had no juris-

<sup>1</sup>Reported in 93 Pac. 66.

diction of the case, for the reason that the service was had upon the commissioner of insurance in Thurston county, and that all actions against a foreign corporation must be brought in the county where the statutory agent resides. Upon such plea the court entered a judgment dismissing the complaint, for the reason that the superior court of Spokane county had no jurisdiction to try the cause, to which order appellant excepted and this appeal is taken.

The respondent relies upon the case of *Hammel v. Fidelity Mutual Aid Ass'n*, 42 Wash. 448, 85 Pac. 35. There action was brought upon an accident insurance policy, and the suit was instituted in Snohomish county. The defendant was a foreign corporation. The summons was personally served upon one C. G. Heifner, who had been appointed statutory agent by the defendant, and who was served in King county. The defendant interposed a motion to dismiss the cause on the grounds that it was a foreign corporation; that at the time of the service of summons it had no office for the transaction of business in Snohomish county; that no person resided in said county upon whom process against the defendant might be served, and that the court was therefore without jurisdiction. The motion was supported by affidavit showing that, at the time of the service upon Mr. Heifner, the statutory agent of defendant, he was, and for a long time prior thereto had been continuously, a resident of Seattle, King county, and that he was then such a resident. This service was held bad by this court by reason of the doctrine announced in *McMaster v. Advance Thresher Co.*, 10 Wash. 147, 38 Pac. 670, and such holding was a construction of Bal. Code, § 4854 (P. C. § 310), which provides that an action against a corporation may be brought in any county where the corporation has an office for the transaction of business, or any person resides upon whom process may be served against such corporation. But that statute is not involved in the case at bar. This is a special statute relating to beneficiary societies who are not authorized to appoint agents in counties where they do their principal

Dec. 1907]

Opinion Per DUNBAR, J.

business, but the law arbitrarily imposes upon them the duty of appointing the commissioner of insurance of this state, not as an agent to transact business, but as a person upon whom process may be served. His full duty is performed in this regard when he reports the service upon him to the corporation which is sued, and he is not recognized in any other respect as the representative of the company. Section 6, page 356, of the Laws of 1901 is as follows:

"Each such association now doing business or hereafter admitted to do business within this state and not having its principal office within this state, and not being organized under the laws of this state, shall appoint, in writing, the commissioner of insurance and his successors in office to be its true and lawful attorney, upon whom all lawful process in any action or proceeding against it must be served, and in such writing shall agree that any lawful process against it which is served on said attorney, shall be of the same legal force and validity as if served upon the association, and that the authority shall continue in force so long as any liability remains outstanding in this state."

So that a different proposition is involved from that in a case where a corporation has an office in the county for the purpose of conducting business and has appointed an agent with reference to that general business. In this character of cases the beneficiaries are not generally people of large means, and courts ought not to make it hard for them to obtain redress from foreign corporations. There is nothing in the statute to indicate that it was the intention of the legislature to compel litigants of this character to commence their actions in Thurston county, simply because the person who is arbitrarily mentioned by the statute as the person upon whom service could be made happens to reside in that county.

We think the superior court of Spokane county had jurisdiction of the action, and the judgment is reversed with instructions to proceed with the trial of the cause.

HADLEY, C. J., RUDKIN, CROW, MOUNT, FULLERTON, and ROOT, JJ., concur.

[No. 7087. Decided December 20, 1907.]

LEWIS E. TENNY *et al.*, *Appellants*, v. SEATTLE ELECTRIC  
COMPANY, *Respondent*.<sup>1</sup>

CERTIORARI—TO CITY COUNCIL—MUNICIPAL CORPORATIONS—GRANT OF FRANCHISE—REVIEW. An ordinance of a city council granting a franchise for the use of a street is a legislative act, and is not subject to review by writ of certiorari.

MUNICIPAL CORPORATIONS — VOID ORDINANCES — REVIEW — FRANCHISES—REMEDIES. The remedy against a void act of a city council in granting a franchise over private property on the supposition that it is a public highway is not by review of the ordinance, but by judicial proceedings against persons entering on the land.

Appeal from a judgment of the superior court for King county, Albertson, J., entered June 8, 1907, in favor of the defendants, dismissing proceedings had under a writ of certiorari issued to review the action of a city council in granting a franchise for street railway purposes, after a trial before the court without a jury. Affirmed.

*J. R. Poland and J. C. Whitlock*, for appellants.

*Walker & Munn*, for respondent.

CROW, J.—On March 18, 1907, the council of Columbia, a city of the third class in King county, Washington, passed an ordinance granting to the Seattle Electric Company, a corporation, a franchise to construct maintain, and operate a street car line over and upon certain streets and highways. Lewis E. Tenny and Carrie B. Tenny, his wife, the relators and appellants herein, were then, and still are, owners of block 89, Maynard's Lake Washington Addition to the city of Seattle, now within the corporate limits of the city of Columbia. Many years ago a public county road, known as road No. 169, extended diagonally across the tract of land which has since been platted as block 89. Relators allege that this road was

<sup>1</sup>Reported in 92 Pac. 895.

Dec. 1907]

Opinion Per Crow, J.

long since abandoned; that it has ceased to exist; that the portion of block 89 formerly occupied thereby is their private property subject to no public rights or easements; that the council of the city of Columbia, assuming that the road is still a highway, have, in the ordinance above mentioned, attempted to grant a franchise and right of way to the Seattle Electric Company, along the line of the abandoned public road and over their private property, and that the Seattle Electric Company is about to enter upon and occupy the same.

After the passage of the ordinance the relators applied to the superior court of King county for a writ of certiorari to review the action of the city council in passing the ordinance, and in their petition have made the city of Columbia, its mayor and clerk, the individual members of the city council, and the Seattle Electric Company, a corporation, parties defendant. Upon notice a writ of review was issued, to which the municipal authorities made return by affidavit, alleging their several capacities as officers of the city of Columbia, and further alleging that on May 2, 1907, the city of Columbia was annexed to the city of Seattle and ceased to be a separate corporation; that by such annexation their terms as officers had expired; that at no time since have any of them been custodians of any official records of the proceedings of the municipality, but that the same have passed into the custody and control of officers of the city of Seattle. At the final hearing the respondents attacked the jurisdiction of the trial court by motion to quash the writ of review theretofore issued and to dismiss the proceeding. Thereupon the relators made an application for leave to amend their petition by making the city of Seattle a party defendant, and moved for an alias writ of certiorari against said city of Seattle and its clerk. This application being denied the motion of the respondents was sustained, and the proceeding being finally dismissed, the relators have appealed.

The appellants contend that the trial court erred, (1) in refusing to make the city of Seattle and its clerk parties de-

fendant; (2) in quashing the writ of review and dismissing this proceeding. They further contend that they have no adequate remedy at law or by appeal; that the council of the city of Columbia in passing the ordinance exercised judicial functions; that they exercised such judicial functions erroneously to the detriment of appellants' rights, and that they exceeded their powers and jurisdiction in attempting to grant a franchise over county road No. 169, and especially over block 89. The respondents insist that the trial court had no jurisdiction to review the action of the municipal authorities of the city of Columbia by a writ of certiorari, as the city council in passing the ordinance were performing a legislative act and not a judicial one as contended by appellants.

Appellants have mistaken their remedy. While a writ of certiorari may issue to review judicial action when there is no remedy by appeal, it will not issue to review mere legislative acts. The appellants, however, for the purpose of maintaining their right to the writ, insist that the action of the council of the city of Columbia, being an exercise of discretion, was judicial. In substance they admit that, if the granting of the franchise was a legislative act, they are not pursuing the proper remedy. The passage of an ordinance by a city council granting a franchise to a public service corporation involves legislative action only. *Schwede v. Hemrich Bros. Brewing Co.*, 29 Wash. 21, 69 Pac. 362; *Hindman v. Boyd*, 42 Wash. 17, 84 Pac. 609; 27 Am. & Eng. Ency. Law (2d ed.), pp. 14, 15; McQuillin, *Municipal Ordinances*, § 569; *Nellis, Street Surface Railroads*, § 4. Such legislative action cannot be reviewed by a writ of certiorari. 6 Cyc. 753; *Spelling, Injunctions and Other Extraordinary Remedies* (2d ed.), § 1899a; *In re Wilson*, 32 Minn. 145, 19 N. W. 723; *Spring Valley Water Works v. Bryant*, 52 Cal. 132; *People v. Supervisors etc.*, 25 Hun. 131; *Whittaker v. Venice*, 150 Ill. 195, 37 N. E. 240.

If there is no legal highway over appellants' land, a fact which cannot be adjudicated in this proceeding, the city of

Dec. 1907]

Syllabus.

Columbia had no authority to grant the franchise over the same, and the attempted grant would be void. Appellants, however, would be entitled to protect all their rights by proper judicial action or proceedings should the Seattle Electric Company at any time hereafter enter upon their property for the purpose of using the alleged franchise granted. The trial court had no authority to review by a writ of certiorari the legislative action of the city council.

The judgment is affirmed.

HADLEY, C. J., MOUNT, and FULLERTON, JJ., concur.

[No. 7095. Decided December 26, 1907.]

*In the Matter of Proceedings for the Disbarment of  
J. W. ROBINSON.*<sup>1</sup>

ATTORNEY AND CLIENT—DISBARMENT—JURISDICTION. The supreme court has inherent original jurisdiction, irrespective of statutes, to suspend or disbar an attorney for contemptuous conduct.

SAME—GROUNDS—CONTEMPTUOUS CONDUCT. An attorney is guilty of contemptuous conduct warranting his suspension from practice, under Bal. Code, § 4765, requiring an attorney to maintain due respect for the court and to refrain from any artifice or false statement and all offensive personality, where his petition for a rehearing attempts to intimidate the court into rendering a favorable decision by setting forth that scandalous and offensive rumors are current to the effect that a majority of the court had prejudged the case and agreed to dismiss the appeal in return for political favors received, and that the only way to refute such scandals and uphold the dignity of the court would be to deny the motion to dismiss and hear the case on its merits.

SAME—DEFENSES—DISAVOWAL—SENTENCE. A disavowal of improper motive in the employment of scandalous and contemptuous language in a petition for a rehearing, with an apology, will not be considered a complete defense to disbarment proceedings, where the attorney had long experience at the bar; and the offense being flagrant, mere reprimand is insufficient, and the attorney will be suspended for six months, and costs of briefs taxed against him.

<sup>1</sup>Reported in 92 Pac. 929.

Hearing on application for disbarment filed in the supreme court, November 16, 1907, upon motion of the attorney general. Order of suspension entered.

*The Attorney General, A. J. Falknor, Assistant, and R. G. Sharpe, for applicant.*

*Ben Sheeks, W. R. Bell, and T. M. Vance, for respondent.*

Crow, J.—On September 26, 1907, this court dismissed an appeal in cause No. 6800, entitled “In re Estate of John Sullivan, Deceased. Marie Carrau, appellant, v. Edward Corcoran et al., respondents.” On October 28, 1907, J. W. Robinson, as attorney for the appellant, filed a petition for rehearing, containing the following language:

“When I started to dictate this petition for rehearing, I intended to place herein the facts as to the rumors which had become common property of the public in the City of Seattle, at the time and shortly after the motion to dismiss this appeal was filed in May, 1907, claiming and pretending to know in advance, which of the honorable members of this court were to vote to dismiss this appeal, and the names of four of the members of this court were bandied from mouth to mouth in public, who it was alleged, for political reasons, were to dismiss this appeal, involving an estate worth more than a million dollars, one-half of which, as shown upon the records in this court for years past, belonged or would belong to the political ring who has controlled the politics of this state for years and under whose influence and direction it was stated certain members of this honorable court were nominated to their present exalted position, and the head of which ring was in position to control with the president of the United States the Federal patronage in the State of Washington, which included in the very near future the position of our circuit and two United States district judges, for which positions members of this court had been agreed upon, and that this rumor was such common property in Seattle as well as in other portions of the state, that business men and citizens of integrity feeling humiliated that any person would dare make such a suggestion or such a statement about the judges of

Dec. 1907]

Opinion Per Crow, J.

the highest court in this state, that they were demanding that a grand jury investigate the litigation and the people including the courts, connected with the litigation and distribution of the Sullivan estate. And while we fully realize that this honorable court and its members are practically powerless to meet such assaults, and that its dignity ordinarily will not allow or permit its members to recognize such slander, it is nevertheless true that this honorable court in passing upon this motion to dismiss this appeal had the opportunity, and as we believe it was its duty to itself and to each member of the court, and to the good name of the court and the good people of this state, and as a complete and perfect answer to all that was being said in the exercise of the court's powers to dismiss an appeal for failure to do something which did not go to or affect the jurisdiction of the court, to have resolved every doubt in favor of hearing the same, and thus wiped out every slander in the exercise of its discretion, and said that it would hear this appeal upon its merits, thus giving the world to know that it was far from such politics.

"And barring absolutely the personal interest and selfishness of litigants and counsel, and we submit that it became the duty of this honorable court, as sacred and conscientious as any responsibility which ever rested upon them, to deny this motion and hear this appeal upon its merits, which was the only method in harmony with its dignity under the circumstances. And the influence of such a decision in the face of the poison, slander and infamy, which has been heaped upon certain members of the court, would have had the best possible influence upon the good the supreme court of the State of Washington may do for the next third of a century. This is an age when corruption and political graft have become so almost universal in official life, as viewed and believed by the masses, that no opportunity to disabuse the mind of such ought to be overlooked by the courts.

"It is possible that the members of this honorable court do not know of that which started as gossip, then grew into rumor, and then to positive statements and to a fixed belief in the minds of very many people until it became the common property of all, heard upon the streets, in the hotels and in every social gathering; but if this honorable court, or any member of it, has any doubt as to this condition or the names of the members of this honorable court of whom these things

have been said, all they are required to do is to ask some intimate friend in Seattle to investigate and in confidence to report, and they will find that their names, and what has been claimed, and what is alleged they have pledged to do in advance, concerning this appeal and its dismissal, will have been in the mouths of the best business and professional people in Seattle, as well as in the mouths of the uneducated bootblack and bellboy.

"This petition for rehearing, while it is filed in a public office does not become public property, and the public knows nothing of what is said in these petitions, unless those who file them or some other person desire they should get to the public; and so these words are said to the court without any desire in the remotest degree to reflect upon the court; but these sentences are dictated because of a high sense of duty in harmony with a high ideal of courts and judges, and with the statement that it is said with the greatest respect for this honorable court, and with the hope that some action may be deemed proper to the end that such conditions and those causing them may be not overlooked or forgotten."

On November 16, 1907, an order was entered, directing the attorney general to institute proper proceedings, citing said J. W. Robinson to appear and show cause why, for his offense in using such language, his name should not be removed from the roll of attorneys admitted to practice law in the state of Washington. Being duly cited, the respondent appeared in person and by attorney, and filed a verified answer, in which he in substance alleged that he was enrolled as an attorney of this court in July, 1883; that it has at all times since been his purpose to uphold the dignity, good name, and independence of the courts; that he admits the writing and filing of the petition containing the language above quoted; that in using such language he had no thought or intention of being insolent or disrespectful toward this court; that the language was hastily dictated, but two days prior to the expiration of the time for filing the petition; that it was hurriedly transcribed and submitted without opportunity to consult his associate counsel; that in none of the language used

Dec. 1907]

Opinion Per Crow, J.

did he intend to induce this court, by other than what he considered legitimate argument, to decide in his favor; that the proceeding wherein the petition was filed was one of arduous litigation, extending over a period of seven years, and of vast importance to his client; that the rumors mentioned had come to his knowledge, weighed on his mind, annoyed him both on account of his case and also on account of the feeling he entertained for the good name of this court; that at no time prior to the order of this court directed to the attorney general, had it occurred to him that the language might be thought contemptuous or in any way disrespectful to this court or any of its members; that he now accepts the action of the court as holding that the language may be susceptible of such construction; that he respectfully asks permission to expunge the same, and that he now offers to, and does, apologize to this court. He prays that his disclaimer be accepted; that the objectionable language be stricken; that he be permitted to substitute a corrected petition, and that these proceedings be dismissed.

By his answer the respondent does not question our original jurisdiction, but his attorneys did so in their oral argument in response to the opening brief of the attorney general. It is well settled by numerous decisions that a court authorized to admit an attorney has inherent jurisdiction to suspend or disbar him for sufficient cause, and that such jurisdiction does not necessarily depend on any express constitutional provision or statutory enactment. In the *Lambuth case*, 18 Wash. 478, 51 Pac. 1071, this court said:

"But power to strike from the rolls is inherent in the court itself. No statute or rule is necessary to authorize the punishment in proper cases. Statutes and rules may regulate the power, but they do not create it. It is necessary for the protection of the court, the proper administration of justice, the dignity and purity of the profession, and for the public good and the protection of clients. Attorneys may forfeit their professional franchise by abusing it, and the power to exact

the forfeiture is lodged in the courts which have authority to admit attorneys to practice. Such power is indispensable to protect the court, the administration of justice, and themselves; and attorneys themselves are vitally concerned in preventing the vocation from being sullied by the conduct of unworthy members."

Respondent's attorneys insist that this decision has been overruled by the subsequent case, *In re Waugh*, 32 Wash. 50, 72 Pac. 710. A clear distinction exists between the two cases. In the *Lambuth* case the proceeding was an original one, ordered by this court under circumstances almost identical with those now before us. There, as here, the respondent incorporated offensive language in a petition for rehearing, and this court in the proper exercise of its jurisdiction directed that original disbarment proceedings be instituted. In the *Waugh* case the fraudulent acts complained of were alleged to have been immediately directed against the superior court of the state of Washington in and for Skagit county, and it was held that the proceedings for disbarment should originate in that court. Although certain expressions in the *Waugh* case when considered separately might possibly suggest the oral arguments made by respondent's attorneys, an examination of the entire opinion will show their contention to be without merit. We have never held, nor was it ever our intention to hold, that this court has no original jurisdiction in a proceeding such as the one now before us. Such jurisdiction undoubtedly exists. *Weeks, Attorneys at Law* (2d ed.), p. 154, § 80; *In re Lambuth, supra*; *Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. 646; *People v. Green*, 9 Colo. 506, 13 Pac. 514; *State ex rel. Johnson v. Gebhardt*, 87 Mo. App. 542; *In re Boone*, 83 Fed. 944; *In re Smith*, 73 Kan. 743, 85 Pac. 584, and note; *State v. Mosher*, 128 Iowa 82, 103 N. W. 105, 5 A. & E. Ann. Cas., p. 990, and note.

Bal. Code, § 4765 (P. C. § 3187), provides that,

"It shall be the duty of an attorney and counselor,—  
. . . 2. To maintain the respect due to the courts of jus-

Dec. 1907]

Opinion Per CROW, J.

tice and judicial officers; . . . 4. To employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never to seek to mislead the judge by any artifice or false statement of fact or law; . . . 6. To abstain from all offensive personality, . . ."

The use by respondent of the insulting, contemptuous, and scandalous language contained in the petition for rehearing constitutes a flagrant violation of each and all of the statutory duties above mentioned. *People v. Green, supra*; *People ex rel. Skelton v. Brown*, 17 Colo. 431, 30 Pac. 338; *Morrison v. Snow*, 26 Utah 247, 72 Pac. 924; *In re Snow*, 27 Utah 265, 75 Pac. 741; *In re Philbrook*, 105 Cal. 471, 38 Pac. 511, 884, 45 Am. St. 59; *In re Woolley*, 74 Ky. 95.

After a careful analysis of respondent's language, we are compelled to hold that he has failed to maintain the respect due to the court; that he has not abstained from offensive personalities, and that he has attempted to intimidate this court into rendering a favorable decision. He is an attorney of ability and long experience in the practice of his profession, who has participated in much important litigation involving intricate questions of law and large financial interests, and has also served as one of the superior judges of this state. It would be idle to suggest that he does not understand the ethics of the honorable profession of which he is a member; that he does not comprehend the obligations resting upon attorneys and counselors at law; or that he does not appreciate that dignity, honor, and respect which should always be extended to the judiciary. In his petition he presented all relevant points, and must have known that the language now under consideration was not germane thereto. While we neither concede nor believe that the rumors mentioned were current in the city of Seattle or elsewhere, nevertheless, if such false and scandalous rumors should at any time exist, a petition for rehearing would not be a proper medium for calling them to the attention of this court. Although we shall not incorporate in this opinion any extensive analysis of the respondent's lan-

guage, we will call attention to certain of his statements with the intention of showing that, while he disavows any personal belief in the alleged rumors, they were deliberately injected by him into the petition with the premeditated design of intimidating this court. The respondent in part said:

"And barring absolutely the personal interest and selfishness of litigants and counsel, and we submit that it became the duty of this honorable court, as sacred and conscientious as any responsibility which ever rested upon them, to deny this motion and hear this appeal upon its merits, which was the only method in harmony with its dignity, under the circumstances. And the influence of such a decision in the face of the poison, slander, and infamy, which has been heaped upon certain members of the court, would have had the best possible influence upon the good the supreme court of the State of Washington may do for the next third of a century. This is an age when corruption and political graft have become so almost universal in official life, as viewed and believed by the masses, that no opportunity to disabuse the mind of such ought to be overlooked by the courts."

This language is susceptible only of the construction that, notwithstanding the respondent's disavowal of his personal belief in the alleged rumors, he has made them a part of the records of this court with the evident intention of intimidating its members into rendering a decision in his favor. He substantially contends that such action is the only avenue of escape for this court from further scandalous rumors which would surely follow an adverse decision. In other words, a reinstatement of his client's appeal would quiet all rumors and protect the good name, integrity and honor of this court, while a contrary ruling would subject it to further charges of political deals, official corruption, and flagrant dishonesty. If the language used does not by innuendo imply that a decision against respondent's client would be such proof of the truth of the alleged rumors as to bring the members of this court into disrepute, we are unable to understand it.

Dec. 1907]

Opinion Per CROW, J.

The respondent further said:

"This petition for rehearing, while it is filed in a public office does not become public property, and the public knows nothing of what is said in these petitions, unless those who file them or some other person desire they should get to the public; and so these words are said to the court without any desire in the remotest degree to reflect upon the court; but these sentences are dictated because of a high sense of duty in harmony with a high ideal of courts and judges, and with the statement that it is said with the greatest respect for this honorable court, and with the hope that some action may be deemed proper to the end that such conditions and those causing them may be not overlooked or forgotten."

In view of the fact that petitions for rehearing need not be served on the opposite party prior to being filed in this court, this language clearly intimates that only by suppressing the petition and granting its prayer, without calling for an answer, can this court protect itself. Further discussion of respondent's statements is unnecessary. Our position is one of extreme delicacy. False and scandalous charges are said to have been made against the members of this court, and the respondent has improperly incorporated them in his petition. By reason of his acts it was our duty to direct the attorney general to institute these proceedings, and we must now pass judgment. Respondent has made an emphatic disavowal of intentional disrespect for this court or any of its members, has withdrawn the statements made, has apologized for his conduct, has requested that the offensive language be stricken; has asked that he be dismissed, and cites the following authorities in support of his contention that courts will not, in the face of a complete disavowal and apology, disbar for offensive language or conduct. *Ex parte Secombe*, 19 How. 13, 15 L. Ed. 566; *Ex parte Bradley*, 7 Wall. 364, 19 L. Ed. 214; *Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. 646; *In re Philbrook*, 105 Cal. 471, 38 Pac. 511, 884, 45 Am. St. 59, and note; *Dickens' Case*, 67 Pa. St. 169, 5 Am. Rep. 420; *In re*

*Austin*, 5 Rawles (Pa. St.) 206; *In re Snow*, 27 Utah 265, 75 Pac. 741.

By reason of such retraction no order of disbarment will be made. In view of respondent's long experience at the bar, we cannot discharge him with a mere reprimand. An order of suspension must be entered.

It is ordered that the respondent's prayer to strike the offensive language be granted. It is further ordered that the respondent be suspended from the practice of his profession as an attorney and counselor at law in the courts of this state for the period of six months from the date of the filing of this opinion, and that he pay the costs to be taxed for printing the brief of the attorney general.

HADLEY, C. J., DUNBAR, MOUNT, RUDKIN, and ROOT, JJ., concur.

FULLERTON, J. (concurring)—I concur in the judgment pronounced by the court in the foregoing opinion. I concur also in the holding that this court has inherent jurisdiction to suspend or disbar an attorney for sufficient cause shown, and that such jurisdiction does not necessarily depend on any express constitutional provision or statutory enactment. This is abundantly shown in the case of *In re Lambuth*, 18 Wash. 478, 51 Pac. 1071, the dissenting opinion in the case of *In re Waugh*, 32 Wash. 50, 72 Pac. 710, and the majority opinion in the case at bar. But in concurring in the judgment I do not wish to be understood as concurring in the interpretation put by the majority on the case of *In re Waugh*. That case as I understood it when it was decided, and as I understand it now, overruled the case of *In re Lambuth*, in so far as the latter case held that this court had inherent power and original jurisdiction to entertain a disbarment proceeding against an attorney, and held that no such power or jurisdiction existed. But since the court now entertains such jurisdiction, it impliedly, at least, overrules the case and reinstates that of *In re Lambuth*. This being true, the question as to what was really

Jan. 1908]

Opinion Per Curiam.

held in the *Waugh* case is no longer a very material one, and for that reason I refrain from discussing it. I cannot, however, refrain from expressing my regret that the court did not directly overrule the case instead of undertaking to distinguish it.

[No. 6837. Decided January 6, 1908.]

NORTH PACIFIC LUMBER COMPANY, *Respondent*, v. JOHN D. CARROLL *et al.*, *Appellants*.<sup>1</sup>

SALES—ACTIONS—EVIDENCE—SUFFICIENCY. In an action to recover a balance due for lumber sold and delivered, findings for the plaintiff are sufficiently supported by evidence of a conversation with one of the defendants in which he admitted that the lumber was received and the account correct.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered November 24, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

*W. E. Crews and Wheeler & Skeel*, for appellants.

*W. C. Bristol and Hastings & Stedman*, for respondent.

PER CURIAM.—The respondent brought this action in the court below to recover a balance alleged to be due for lumber sold and delivered to the appellants. The answer admitted the contract, but denied that the lumber had been delivered as alleged. Upon a trial the court found that the lumber had been delivered by the respondent to the appellants, and used by them to the amount of \$2,415.27, upon which there was paid \$500, leaving a balance of \$1,915.25. Judgment was entered for that amount. The defendants appeal.

The only claim made upon this appeal is that there is no evidence to sustain the finding that the lumber was delivered

<sup>1</sup>Reported in 93 Pac. 212.

to appellants as alleged. The record shows that the president of the respondent company had a talk with one of the appellants after the lumber had been delivered and after an account had been rendered therefor, and that the said appellant admitted in this conversation that the lumber had been received and the account was correct and would be paid, and that subsequently \$500 was paid. There was other evidence, but this was enough to base the finding upon, especially since there was no evidence offered by appellants and no effort made to contradict these statements.

The judgment must therefore be affirmed.

[No. 6887. Decided January 6, 1908.]

OSCAR WIKSTROM, *Respondent*, v. PRESTON MILL COMPANY,  
*Appellant*.<sup>1</sup>

MASTER AND SERVANT—NEGLIGENCE—YOUTHFUL EMPLOYEE—DUTY TO INSTRUCT OR WARN—OBVIOUS DANGERS—EVIDENCE—SUFFICIENCY. In an action by a young and inexperienced employee, set to work upon a cut-off saw in a shingle mill, without instructions or warning, a verdict for the plaintiff will not be disturbed on appeal on the theory that the dangers were obvious, where it appears that some instruction is requisite to qualify one to operate a cut-off saw, and that there are dangers from involuntary contact that instructions and experience would warn against.

SAME—TRIAL—INSTRUCTIONS. An instruction upon the duty of a master need not also cover contributory negligence and assumption of risks where those subjects were fully covered in other instructions.

Appeal from a judgment of the superior court for King county, Griffin, J., entered March 25, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in a shingle mill. Affirmed.

<sup>1</sup>Reported in 93 Pac. 213.

Jan. 1908]

Opinion Per RUDKIN, J.

*Shank & Smith*, for appellant.

*Higgins, Hall & Halverstadt* (Walter S. Fulton, of counsel), for respondent.

RUDKIN, J.—On the 2d day of February, 1906, the plaintiff was injured while operating a cut-off saw in the defendant's shingle mill at Preston, in King county. This action was instituted to recover damages for the injuries thus received, and from a judgment in favor of the plaintiff the defendant has appealed.

The negligence charged in the complaint is that the respondent was young and inexperienced, and was unfamiliar with the operation of cut-off saws; that the appellant, well knowing these facts, negligently ordered the respondent to operate a cut-off saw, without instructing him as to the proper use of the saw, or warning him against the dangers incident thereto; that the shinglebolts supplied were too large for the saw; that the saw was dull, rusty, unguarded, etc. The answer consisted of a denial of the negligence charged and a plea of contributory negligence.

The shinglebolts in question were approximately four feet in length, and it was the duty of the respondent to cut them into blocks 16 inches in length, by means of the cut-off saw. In the progress of this work the respondent had cut two blocks off a bolt and was engaged in cutting the stub end off the third block, with his right hand on the stub, which was from six to nine inches in length, when the saw kicked back, and his hand in some manner came in contact therewith, causing the loss of the greater part of the hand, including the thumb and first two fingers. There was a conflict of testimony on all material facts in issue, and we must assume that the jury found that the respondent was inexperienced and was not instructed as to the proper use of the saw or warned against the dangers incident to such use.

The appellant meets the respondent on this broad ground and contends that the dangers incident to the use and opera-

tion of the cut-off saw were open and apparent to any person of common understanding, and that neither experience, instruction, or warning was necessary. This in a measure is true. Every person who has attained years of discretion knows that a saw will cut and mangle, and that if the operator voluntarily comes in contact therewith injury will of necessity result. But this is largely true of all circular saws, and yet, it is a matter of common knowledge that the dangers incident to their use and operation are manifold and great. The danger from voluntary contact with the saw is not the only danger to guard against. There is also the danger from involuntary contact brought about from improper use of the saw. We think it clearly appears, from all the testimony in this case, that some instruction at least is requisite to qualify one to operate even a cut-off saw, and that there are dangers from involuntary contact that experience and instruction will in a measure ward against. The trial judge and jury saw the respondent and heard his testimony. They were in a better position to judge of his capacity and the necessity for instruction and warning than we are, and we think their conclusion on the facts should not be disturbed.

Exception was taken to one of the instructions given by the court, because it left out of consideration the questions of contributory negligence and assumption of risk. The court could not well embody the entire law of the case in a single charge, and other instructions fully covered these questions. Taken as a whole the charge was eminently fair to both parties, and finding no error in the record the judgment is affirmed.

FULLERTON, CROW, and MOUNT, JJ., concur.

Jan. 1908]

Opinion Per FULLERTON, J.

[No. 7047. Decided January 6, 1908.]

**H. LANGE, Appellant, v. THE RESERVATION MINING &  
SMELTING COMPANY *et al.*, Respondents.<sup>1</sup>**

**CORPORATIONS—CONTRACTS—POWERS OF TRUSTEES—SALE OF PROPERTY.** Where a mining corporation was formed to "buy, sell . . . and deal in mines," the trustees have power, against the objection of minority stockholders, to sell all its property, consisting of mines upon which had been expended over \$56,000, for the sum of \$50,000, since the sale does not disrupt the corporation and is not contrary to its purposes, which may be proceeded with as well after as before the sale.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered September 18, 1907, after a trial on the merits before the court without a jury, dismissing an action brought by a stockholder to enjoin the sale of the entire property of a corporation. Affirmed.

*Wakefield & Witherspoon*, for appellant.

*A. D. McLaren*, for respondents.

FULLERTON, J.—The respondent The Reservation Mining & Smelting Company is a corporation, and the other respondents are the trustees thereof. The respondent corporation was incorporated September 1, 1898, one of the objects for which it was formed being to "buy, sell, . . . and deal in mines." Shortly after its organization, the corporation purchased a group of claims, known as the Lone Star & Washington Consolidated Lode Mining Claims, situated on what was then the Colville Indian Reservation, entered into possession of the same, and between that time and March 10, 1902, expended thereon some \$56,481.53 in development work, in an effort to make the mine a paying investment; the result being that there was extracted from the mines ore of the

<sup>1</sup>Reported in 93 Pac. 208.

value of \$1,090.46. After March 10, 1902, no further effort was made to operate the mines.

On June 1, 1906, the board of trustees entered into a contract for the sale of the mines together with the machinery and tools used in operating the same, being all of the property owned by the corporation, for the sum of \$50,000. On July 30, 1907, at a special meeting of the stockholders, called for that purpose, the matter of the sale was submitted to such stockholders for ratification or rejection. At such meeting, stockholders representing more than two-thirds of the outstanding stock voted to ratify the sale, while stockholders representing 6,500 shares, among whom was the appellant, voted against ratification. Immediately after the adjournment of the meeting, this action was brought to restrain the corporation and the trustees thereof from carrying into effect the contract of sale. The trial judge, at the hearing of the case, ruled that the trustees, with the approval of stockholders owning more than two-thirds of the stock of the corporation, could make the sale, even against the dissent of minority stockholders, and dismissed the appellant's action. This appeal was taken therefrom.

It is the contention of the appellant that neither the trustees, nor a majority of the stockholders of a corporation, have power, against the objection of minority stockholders, to sell or otherwise dispose of the entire property of the corporation, where no necessity exists for such action, such as the payment of legitimate debts, the prevention of further losses from a losing business, or such like causes. Unquestionably this was the rule of the common law as applied to a corporation organized to carry on a particular business, when such sale would have the effect of thwarting the purposes for which it was organized, and destroying the corporation itself; and especially was it true where the purposes of the sale was to "freeze out," or otherwise deprive the minority stockholders from further participation in the profits of the business con-

Jan. 1908]

Syllabus.

ducted by the corporation. *Theis v. Spokane Falls Gas Light Co.*, 34 Wash. 23, 74 Pac. 1004; *Parsons v. Tacoma Smelting & Refining Co.*, 25 Wash. 492, 65 Pac. 765.

But in the case before us the sale does not disrupt the corporation, nor is it contrary to the purposes for which the corporation was formed. On the contrary, the corporation will be in as good a condition to proceed with the objects it was formed to promote, after this sale, as it was before, and the sale will be but fulfilling one of its objects and purposes. Whether the sale is wise or not from a business point of view is not the question. It is a question of power in the board of trustees. And this power exists, we think, both by virtue of the articles of incorporation, and the general law conferring the management and control of the corporate business on the board of trustees. *Pitcher v. Lone Pine-Surprise Consol. Min. Co.*, 39 Wash. 608, 81 Pac. 1047.

The judgment appealed from is affirmed.

HADLEY, C. J., MOUNT, and ROOT, JJ., concur.

CROW, J., took no part.

[No. 6775. Decided January 6, 1908.]

F. K. SHIPLEY *et al.*, Appellants, v. W. T. GAFFNER *et al.*,  
Respondents.<sup>1</sup>

TAXATION—FORECLOSURE—SUMMONS—NAME OF OWNERS. The fact that taxing officers, in issuing certificates of delinquency and publishing notice on foreclosure, knew or by reasonable diligence could have ascertained the true ownership, does not invalidate a tax judgment and deed secured upon summons by publication against unknown owners, where the property was assessed to unknown owners or the name of the owner left blank; since the proceeding is in rem and the statute, Bal. Code, §§ 1699, 1749, does not require the officer to use diligence to ascertain the ownership

<sup>1</sup>Reported in 93 Pac. 211.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 20, 1907, upon sustaining a demurrer to the complaint, dismissing an action to recover possession of real property and to quiet title. Affirmed.

*Elias A. Wright* and *F. C. Kapp*, for appellants.

*Eugene A. Childe*, for respondents.

MOUNT, J.—This action was brought by appellants against respondents, to recover possession of certain real estate in King county which respondents claim under a tax deed, and also to remove the cloud thereby created. The general demurrer interposed to the amended complaint by respondents was sustained. Appellants elected to stand on their complaint, and an order of dismissal was entered, from which this appeal was prosecuted.

The amended complaint alleged, that appellants acquired the fee simple title to said property in November, 1889; that they have continued to be the sole owners and entitled to the exclusive possession thereof ever since; that the tax rolls in the office of the county treasurer for the years 1891, 1892, 1893, 1894, show that appellant F. K. Shipley, as owner, had duly paid the taxes for those years before delinquency; that in the tax rolls for the years 1891, 1892, and 1896 to 1902, both inclusive, said property was assessed to appellant F. K. Shipley, he being designated therein as the owner thereof; that in preparing the tax rolls for the year 1895, the county officials carelessly and negligently failed to insert the names of appellants as owners of said property, and left the space provided therefor blank, although each of said officials well knew, or by the use of reasonable diligence could have ascertained, that the appellants were the owners thereof; that on January 31, 1898, at which time the rolls of all the prior years were in his office, the treasurer of said county issued to the county a certificate of delinquency against said property for the taxes of the year 1895, amounting to \$2.20;

Jan. 1908]

Opinion Per MOUNT, J.

that he carelessly and negligently neglected to name appellants as the owners of said property in the certificate, the space provided therefor having been left blank, although he well knew, or by the use of reasonable diligence could have ascertained, that appellants were the owners of said property; that he thereafter filed such certificate as the complaint in an action to foreclose the same; that neither of the appellants was named as a party to said action or attempted to be served with any process whatever; that in the published summons, which was the only process served or attempted to be served on the appellants in said action, appellants were not named at all, said property being designated therein as belonging to unknown owners, although the county treasurer well knew, or by the use of reasonable diligence could have ascertained, that the appellants were the owners thereof; that thereupon a decree of sale was entered and said property was advertised to be sold as belonging to unknown owners; that in November, 1902, a treasurer's deed was issued to respondent W. T. Gaffner, under which respondents claimed title to said property; that neither of appellants had any actual or constructive knowledge of said proceedings until August, 1906; that said property is worth \$1,000; that a proper tender of all taxes, penalties, interest and costs had been made prior to the commencement of this action, which tender was refused; that by virtue of said matters the tax deed, under which respondents claim title to said property, was void and constituted a cloud upon the title of appellants.

The main question in the case is, may the county foreclose for delinquent taxes against property assessed to unknown owners, if the taxing officers knew, or by reasonable diligence could have ascertained, the names of the real owners. We have repeatedly held that these tax foreclosure proceedings are *in rem*, and not against the person of the owner, and that owners are bound to take notice of the property they own and pay the taxes thereon and defend against foreclosure for

delinquent taxes, even though the property is assessed to unknown persons or to other persons. *Rowland v. Eskeland*, 40 Wash. 253, 82 Pac. 599, and cases there cited.

In reference to the assessment of real estate, the statute in force at the time the assessment in this case was made provided "the assessor shall make out in the detail and assessment list book, in numerical order, complete lists of all lands or lots subject to taxation, showing the names of the owners, if to him known, and if unknown, so stated opposite each tract or lot." Bal. Code, § 1699. There is nothing in this language which requires the assessor to use diligence to ascertain the names of the true owners. If he knows he must show them; but if unknown to *him*, he may so state. We think the officer's statement is conclusive upon the question. The statute providing for a certificate of delinquency requires a stub "which shall be a summary of the certificate and shall contain a statement:— (1) Description of the property assessed; (2) year or years for which assessed; (3) amount of tax and interest due; (4) name of owner or reputed owner, if known." Bal. Code, § 1749 (P. C. § 8689). This clearly refers to the name of the owner as stated on the assessment roll, and does not require the treasurer to draw upon his own knowledge or to examine other records to determine the actual ownership or the reputed ownership. The treasurer is simply a ministerial officer who exercises his duty in issuing these certificates, and no negligence can be charged against him when he follows the record as it appears in his office. It is true we said in *Rowland v. Eskeland*, *supra*:

"We held in *Spokane Falls etc. R. Co. v. Abitz*, 38 Wash. 8, 80 Pac. 192, that the notice is sufficient where it is given to the person appearing as owner on the treasurer's rolls when the certificate is issued."

And to the same effect we quoted from the same case in *Carson v. Titlow*, 38 Wash. 196, 80 Pac. 299. We also said in *Rowland v. Eskeland*, at page 258:

"It follows that the actual ownership of the property is

Jan. 1908]

Opinion Per MOUNT, J.

immaterial in these foreclosure proceedings, so long as the owner described in the certificate, and to whom the property was assessed, is given notice of such proceedings."

The idea in these cases was that the treasurer was only required to state in the certificate the person to whom the property was assessed as the same appeared on the assessment rolls in the year when the taxes were delinquent. Some of the language used might, upon careful analysis, be construed as meaning that the treasurer was authorized or required to state the name of the owner which appeared on the rolls at the date of the certificate; that particular question was not under consideration in those cases and we did not mean to decide questions which were not involved therein. We are of the opinion, however, that the treasurer might, under the statute, state the name at either time, and that a foreclosure based thereon would be sufficient. It is certainly sufficient where he states the name as it appears on the rolls as the property was assessed. In this case the fact that the name of the owner was left blank amounted to a statement that the owner was unknown, in view of the rule that these proceedings are *in rem* and that owners are bound to take notice of the taxes against their property. The fact that the taxing officers knew, or by reasonable diligence could have learned, the true ownership, does not invalidate the tax or foreclosure proceedings where the property is assessed to unknown owners.

The lower court therefore properly sustained the demurrer, and the judgment must be affirmed.

HADLEY, C. J., CROW, and ROOT, JJ., concur.

RUDKIN and FULLERTON, JJ., took no part.

[No. 6898. Decided January 6, 1908.]

CHICAGO LUMBER & COAL COMPANY, *Appellant*, v. ANDREW  
McCANN *et al.*, *Respondents*.<sup>1</sup>

SALES — PLACE OF DELIVERY — CONTRACTS — CONSTRUCTION. AN agreement whereby the seller of shingles in carload lots guaranteed a fixed weight per thousand, paying the freight if in excess, and receiving what was saved if the actual weight were less, which adjustment was made after arrival of the car at its destination, does not show that delivery was to be made at the point of destination, where the buyer had control of the car after it was loaded.

Appeal from a judgment of the superior court for King county, Tallman J., entered April 5, 1907, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action on contract. Affirmed.

*Shorett & Shorett*, for appellant.

*Smith & Cole*, for respondents.

MOUNT, J.—Appellant brought this action to recover from respondents \$206.70, alleged to have been paid to respondents for a carload of shingles which were not delivered to appellant. The respondents admitted the receipt of the money, but denied that the shingles were not delivered to appellant. The case was tried to a court without a jury. The only question in the case was whether the shingles were delivered to appellant. The trial court found that they were delivered, and entered a judgment of dismissal.

It appears that respondents had been selling shingles to appellant for some time, and delivering the same on cars of the Northern Pacific Railway Company at Falls City, Washington; that when a car was loaded at that place, an invoice thereof would be mailed to appellant's agent at Seattle. By

<sup>1</sup>Reported in 93 Pac. 216.

Jan. 1908].

Opinion Per MOUNT, J.

reason of the fact that the railway company had no agent at Falls City, a bill of lading was issued by the railway agent at Preston, about five miles distant from Falls City, and a copy of the bill of lading was usually mailed by the railway agent to the appellant at Seattle, as consignor. Upon receipt of the invoice, the appellant would pay the purchase price of the shingles to respondents. There was an understanding between the appellant and respondents that one thousand shingles should have a fixed weight. If the actual weight were more than the fixed weight, the respondents would deduct from the price of the shingles the freight on the excess weight to the points where appellant destined the shingles. If the actual weight were less, the appellant would pay respondents the amount saved thereby on freight.

On March 24, 1905, at appellant's order, respondents loaded Northern Pacific car No. 2268 at Falls City, and directed the same by order of appellant to be shipped to Alliance, Nebraska, and requested the railway agent at Preston to send a copy of the bill of lading to appellant at Seattle. Respondents at the same time sent an invoice to the appellant at Seattle, whereupon appellant paid to respondents \$206.70, the purchase price of the shingles. The railway agent at Preston by some mistake did not send the bill of lading to appellant. Appellant, however, assumed control of the car and, while the same was en route to Alliance, Nebraska, diverted the shipment to Endarka, Oklahoma. For some reason which does not clearly appear, the carload of shingles was lost to appellant. This action was brought to recover back from respondents the \$206 paid for the shingles.

There is a direct conflict in the evidence as to whether the contract was for delivery on board the cars at Falls City, or at the point of destination of the car. Appellant argues, because the freight was subject to adjustment after the arrival of the car at its destination, that this fact shows that delivery was to be made at the point of destination of the car; but we

think this fact does not have the effect claimed for it. It is not claimed that respondents agreed to pay any part of the freight if the shingles weighed the fixed weight. If they weighed more than the fixed weight, respondents were to pay freight for the excess weight only. If the shingles weighed less, appellant was to pay to respondents the difference in the freight charges. This amounted simply to a guaranty of weight, nothing more, and did not, and was not intended to, fix the place of delivery. It is not claimed that this particular car weighed more or less than the guaranteed weight, or that the respondents had any control of the car or the shipment after the shingles were loaded on the car of the railway company. We are satisfied from an examination of all the evidence, which need not be stated here, that the contract was for delivery at Falls City, and that the trial court properly found that fact.

The judgment should therefore be affirmed.

HADLEY, C. J., CROW, and ROOT, JJ., concur.

RUDKIN and FULLERTON, JJ., took no part.

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[No. 6955. Decided January 6, 1908.]

VICTOR SAFE & LOCK COMPANY, *Respondent*, v. B. F. O'NEIL  
*et al.*, *Appellants*.<sup>1</sup>

EVIDENCE—PAROL EVIDENCE TO VARY WRITING—SALES—WAIVER OF VERBAL AGREEMENT. Upon the sale of a safe by a written order, which expressly waived all claims for verbal agreements not embodied in the writing, and which was addressed to, and subject to the approval of, the home office at C., it is incompetent for the vendees to show a verbal agreement that the safe was to be shipped immediately from an agency at P., and was purchased only on such condition.

SALES—DELIVERY—TIME FOR COMPLIANCE WITH ORDER. An order for a safe, to be shipped "as soon as possible" is complied with where no finished safes were in stock when the order was received,

<sup>1</sup>Reported in 93 Pac. 214.

Jan. 1908]

Opinion Per HADLEY, C. J.

but one in the course of manufacture was rushed to completion with diligence and shipped nineteen days after receipt of the order.

SAME—WITHDRAWAL OF ORDER—ACTION FOR PRICE—DEFENSES. A conditional threat to withdraw an order for a safe, if not found to be as represented, or unless the same should be submitted to a test, does not amount to a withdrawal of the order in law which would constitute a defense to an action for the price.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered January 19, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

*Gallagher & Thayer*, for appellants.

*Happy & Hindman*, for respondent.

HADLEY, C. J.—This is an action to recover the purchase price of a bank safe. Plaintiff is a corporation with its home office at Cincinnati, Ohio, and the defendants are copartners, under the firm name of the "Bank of Latah," doing business at Latah, Washington. The complaint alleges, that in consideration of the sum of \$1,400, to be paid in the manner hereinafter specified, the plaintiff agreed to sell and deliver to the defendants, f. o. b. car at Latah, Washington, one Victor manganese steel screw-door bank safe; that the defendants agreed to purchase and receive the safe, and to pay the plaintiff the said sum of \$1,400, as follows: To deliver to plaintiff, upon compliance of the latter with said contract, one double-door Hall safe, with burglar-proof chest, f. o. b. car at Latah, Washington, and to pay the plaintiff the sum of \$950 cash. It is further alleged that the plaintiff fully performed all conditions imposed upon it by said contract, and delivered to defendants at Latah, the Victor safe mentioned in the contract, but that the defendants have refused to deliver to plaintiff the Hall safe mentioned, or to pay said sum of \$950, or any other sum. Based upon the above al-

legations, the plaintiff brought this suit to recover the full sum of \$1,400, the purchase price of the safe.

The defendants answered that, about September 18, 1905, one Marcellus, the representative of Glass & Prudhomme, the agents of plaintiff at Portland, Oregon, visited the defendants at Latah, and solicited them to purchase a safe from the plaintiff through said agents; that in order to induce the defendants to make the purchase, said Marcellus represented that Glass & Prudhomme had a safe then at Portland, which they could ship immediately from Portland to the defendants; that the defendants were anxious to obtain the immediate delivery of any safe they might purchase, and made such fact known to said Marcellus and to said agents, and that they would not purchase any safe that could not be delivered immediately; that relying upon said representations and believing that the plaintiff had a safe in Portland which it could and would ship to the defendants immediately, they placed the order for the purchase of the safe from plaintiff. It is alleged that the plaintiff did not deliver said safe within a reasonable time or at all, and that defendants never accepted the safe mentioned in the complaint. The cause was tried by the court without a jury, and resulted in a judgment against the defendants for the full purchase price of the safe, with interest. The defendants have appealed.

Appellants have assigned a number of specified errors, but the appeal involves the one question, whether the judgment is justifiable under the facts. The order from appellants for a safe is shown by the evidence as follows: By a partly printed and partly written instrument which is designated as "Specifications Victor Manganese Steel Screw-Door Bank Safes," upon the same page of which heading follow detail specifications of a safe as to size, materials, and workmanship. On the next page or reverse side of the sheet containing such specifications appears a written order for a safe, of which the following is a copy:

Jan. 1908]

Opinion Per HADLEY, C. J.

"The Victor Safe and Lock Company, Cincinnati, Ohio.

"Gentlemen:— Please furnish us in accordance with the foregoing specifications one No. 49 Victor Manganese Steel Screw-Door Bank Safe, carefully packed and delivered f. o. b. cars at Latah, Wash. Bill to The Bank of Latah, Latah, Wash. Ship as soon as possible via freight. On receipt of same in good condition will pay to your order the sum of Fourteen Hundred Dollars as follows: Nine Hundred and Fifty Dollars (\$950) in current funds and one (1) Double Door Hall safe with Burglar proof chest f. o. b. Latah, Wash. This contract covers all of the agreements between the parties hereto, and all claims for verbal agreements of any nature not embodied herein are waived, and order is taken subject to the approval of the Cincinnati office of the Victor Safe and Lock Company. All orders must be on this blank. Witness my hand and seal this 25th day of Sept. 1905.

"Bank of Latah (L. S.)

"Wm. A. McEachern (L. S.)"

It will be seen that the order refers particularly to the said specifications, was made by the appellants, and was addressed to the plaintiff at its home office in Cincinnati. It expressly declares that it contains all the agreements between the parties; that all claims for verbal agreements of any nature not embodied in the writing are waived, and that the order was subject to the approval of the Cincinnati office of the plaintiff. Thus the appellants solemnly said, over their own signatures, that the writing contains the whole contract between the parties, and that any further verbal agreements were waived. By their answer and by evidence received at the trial, they, however, sought to show a verbal agreement that the safe was to be shipped from Portland, Oregon, immediately upon the receipt of the order by Glass & Prudhomme. By the terms of the written order, such evidence became incompetent, it being evidence entirely inconsistent with the written order. The order not only made no mention of such agreement as to immediate shipment from Portland, but in effect negatived the existence of such agreement, for the reason that it was addressed to the respondent at its Cincinnati office and was

expressly made subject to the approval of that office. The evidence shows that, in the regular course of transmitting mail from Portland to Cincinnati, at least four days are required, a fact which the appellants must be held to have had in view at the time they made the order.

The evidence shows that the order was forwarded at once by Glass & Prudhomme to the Cincinnati office by respondent; that there were no finished safes in stock at the time; that the customary time for filling the order by the manufacturer of a new safe was about thirty days; that respondent immediately directed that a safe which was then in process of manufacture should be rushed to completion for the purpose of filling this order; that this was done, and the safe was finished and shipped to appellants nineteen days after receipt of the order. The evidence clearly shows that all possible diligence was exercised by respondent to fill the order, under the circumstances as they existed at the time the order was received.

Appellants urge that they were not required to wait until a safe could be manufactured, and that they were entitled to immediate shipment when the order was received. Their order did not call for immediate shipment, but said "ship as soon as possible." We have seen that the shipment was made as soon as possible under the existing circumstances, and under such general directions as to shipment. In the absence of more definite specifications as to time, we think the shipment which was made was a substantial compliance with the order. To be sure an unreasonable lapse of time could not be held to have been within the spirit of the order, but the time here was not unreasonable, considering the circumstances.

Pending the manufacture and shipment of this safe as aforesaid, no correspondence was had directly between respondent's home office and appellants, and the latter contend that they were not advised that respondent had accepted the order, for which reason they say it was not in law accepted

Jan. 1908]

Opinion Per HADLEY, C. J.

so as to make a contract before the time when appellants claim that they withdrew their order. The answer does not allege any withdrawal of the order before acceptance, and that subject was not introduced by the pleadings; but in view of the evidence, we will examine that subject. The order was in fact immediately acted upon by respondent, as we have seen, and it at once set about filling it. This was followed by actual shipment and the arrival of the safe at Latah as requested in the order. Whatever may be said as to whether there was such an acceptance as made a completed contract prior to the arrival of the safe at Latah, it must, in any event, be held that there was a complete acceptance when the safe reached Latah, and unless appellants had in legal contemplation theretofore withdrawn their order, the contract became complete and they were bound by the terms of their written order. Was there such a withdrawal? Before the shipment was made the appellants addressed to Glass & Prudhomme, at Portland, the following communication:

"It has been brought to our notice that the safe we ordered from you through Mr. Marcellus is not the article we understood we were getting and that was represented to us at the time the proposition was made us which led up to the order. Our order was given on the representation that the Victor Safe was **THE BEST IN THE WORLD**, in the sense that it was the most burglar proof and would stand the most severe attack that could be made on it, and to be the equal or superior of any safe made, the Manganese Steel Safe and all the rest of them included. We will look into this matter a little further, but now write to advise that if we are not getting the strongest and best safe made we are not getting what we ordered and what was represented to us in the sale, and will not receive it if such be the case."

Later the following was also addressed by appellants to the same persons:

"We addressed you on Oct. 6th a letter in regard to safe ordered from you and advising you that if we found upon investigation that this safe has been misrepresented to us that we would refuse to accept it. We have had no reply to this

letter and now write to advise you that we have made a thorough investigation into the matter and find that we cannot accept your Victor Manganese safe unless you will submit it to an honest test as to its burglar proof qualities."

The matters urged in the above letters as representations made by respondent's agents were not mentioned in the specifications of appellants' written order. They therefore became a part of the verbal representations which, as we have seen, were all expressly waived. The existence of such representations was the only ground stated for a possible future refusal to accept the safe, facts which appellants are not entitled to urge as against a completed contract, because they have expressly waived them. Assuming, however, that they had the absolute right of withdrawal before the acceptance of the order by respondent, without any regard to the reason given therefor, the fact remains that there was no absolute withdrawal. The claim that there was a withdrawal is based entirely upon the above letters, and an inspection of them clearly shows that there was a mere conditional threat to withdraw. The matter was still left open for respondent to establish the burglar-proof qualities of the safe. Thus, there was voluntarily left open for further investigation ground for dispute as to facts that might have required a judicial determination to settle before it could be definitely known whether appellants would or would not withdraw. Such cannot be a withdrawal in law. To amount to a withdrawal there must be communicated a distinct, unequivocal, and unconditional statement to that effect, so definite as to leave no doubt that further relations between the parties on the subject are at an end. The renunciation of an offer to contract should, in substance, be as explicit and definite as a renunciation of the contract after its acceptance. With reference to the renunciation of a contract, the rule is stated in vol. 2, Mechem on Sales, § 1087, as follows:

"Where before the time arrives for the performance of the contract by one party, the other absolutely and unqualifiedly

Jan. 1908]

Opinion Per HADLEY, C. J.

announces that he will neither receive such performance by the former nor perform on his part, the former may, if he desires, consider himself as absolved from his duty to perform. This renunciation by the other, however, must be more than a mere threat of nonperformance, and *a fortiori*, more than mere idle talk of not performing; it must be a distinct, unequivocal and absolute refusal to receive performance or to perform on his own part."

See, also, Benjamin, Sales (Bennett's ed.), § 568; 9 Cyc. 637; *Dingley v. Oler*, 117 U. S. 490, 6 Sup. Ct. 850, 29 L. Ed. 984; *Smoot's Case*, 15 Wall. 36, 21 L. Ed. 107; *Kilgore v. Northwest Texas Baptist Ed. Ass'n*, 90 Tex. 139, 37 S. W. 598; *Vittum v. Estey*, 67 Vt. 158, 31 Atl. 144.

There was therefore no effectual withdrawal of the order prior to the arrival of the safe at Latah, and the acceptance of the order became complete at that time, making a completed contract between the parties. Appellants wholly refused to perform either in kind or otherwise, and the right of action thereupon accrued to respondent for the recovery of the full purchase amount, the safe being held subject to appellant's order. *Schott Co. v. Stone, Fisher & Lane*, 35 Wash. 252, 77 Pac. 192.

For the foregoing reasons the judgment is affirmed.

FULLERTON, CROW, MOUNT, and ROOT, JJ., concur.

[No. 6628. Decided January 7, 1908.]

T. E. COLLINS *et al.*, *Plaintiffs and Appellants*, v. FRED B. HUFFMAN, *Respondent*, and FIDELITY & DEPOSIT COMPANY, *Defendant and Appellant*.<sup>1</sup>

APPEAL — REVIEW — HARMLESS ERROR — ADMISSION OF EVIDENCE. Error in permitting a witness to answer a question as to whether he had made a contract for certain specified reasons, which reasons were sought to be shown, is without prejudice when the witness answered that he had made no such contract.

BONDS — ACTIONS — DAMAGES — EVIDENCE — ADMISSIBILITY. In an action upon injunction bonds to recover damages by reason of being deprived of the control of a business, evidence as to the collectibility of a certain account is inadmissible where it appears that the account was not taken in charge by the defendants, under the injunction, or its collection taken from the plaintiffs.

SAME. In an action upon injunction bonds to recover damages by reason of the dissipation of a stock of goods, evidence of what the remnant of the stock sold for after dissolution of the injunction is immaterial, where the defendants were charged with the invoice price of the stock; since the invoice price of the remnant, which was turned over to a jobbing association, should be credited to the defendants.

APPEAL — REVIEW — HARMLESS ERROR. Error in overruling an objection to a question is without prejudice when the witness stated that he could not answer the question.

SAME — PREJUDICE. The burden is upon appellants to show that errors alleged operated to their prejudice.

TRIAL — INSTRUCTIONS IN WRITING — STATUTES — CONSTRUCTION. Where a stenographic report of instructions to the jury is made by a stenographer employed by both parties, he is sufficiently under the control of the court to constitute his report "instructions in writing," within the meaning of Laws 1903, p. 119, § 1, requiring written instructions upon demand, provided that a stenographic report of the charge shall be considered a charge in writing.

TRIAL — INSTRUCTIONS — PREJUDICE. Instructions as to damages, if the jury find "any at all" in a case in which nominal damages were conceded, did not mislead the jury where they found substantial damages.

<sup>1</sup>Reported in 93 Pac. 220.

Jan. 1908]

Opinion Per HADLEY, C. J.

**SAME—BONDS—ACTIONS—DAMAGES.** In an action upon injunction bonds for damages by reason of being deprived of the control of a business, no prejudice results from the fact that the instructions inadvertently failed to permit recovery of damages for a certain day, where it was not shown that there was any change of conditions or particular damages sustained on such day.

**SAME—ATTORNEYS FEES AS DAMAGES.** In an action upon an injunction bond, damages for attorney's fees paid are not recoverable where there is no evidence that any attorney's fees were incurred or paid by reason of the injunction separate and distinct from the other issues involved in the case.

**SAME.** In an action upon injunction bonds to recover damages by reason of being deprived of the control of a business, it is not error to instruct that the jury may award damages by reason of a temporary injunction which was in force for six days, where under the evidence it was for the jury to say whether any actual damages accrued.

**INJUNCTION—ORDER FOR—CONSTRUCTION.** Upon a hearing after the issuance of a temporary injunction, an order that the injunction be continued *pendente lite*, and that "an injunction forthwith issue," as prayed for, does not require that another injunction be formally issued, as the order was intended to operate as an injunction upon the filing of the required bond, and to make the temporary order effective thereafter.

Cross-appeals from a judgment of the superior court for Spokane county, Poindexter, J., entered May 3, 1906, upon the verdict of a jury rendered in favor of the plaintiffs, in an action upon injunction bonds. Affirmed.

*Cullen & Dudley*, for appellants.

*Danson & Williams*, for respondent Huffman and appellant Fidelity & Deposit Company.

**HADLEY, C. J.**—This is a suit for damages based upon two injunction bonds. The bonds were executed by the defendant Fred B. Huffman and another, with defendant Fidelity & Deposit Company of Maryland as surety. The facts stated in the complaint are substantially as follows: On the 23d day of December, 1903, in an action then pending in the dis-

strict court of the first judicial district of the state of Idaho, wherein one George W. Huffman and the defendant Fred B. Huffman were plaintiffs, and the plaintiffs herein were defendants, a restraining order was issued whereby these plaintiffs, the defendants in the former action, were restrained from in any manner interfering with the stock of merchandise, books of account, accounts, and personal property belonging to the Collins Mercantile Company, located at King's Spur, Kootenai county, Idaho, and from in any way interfering with the possession thereof by the said Huffmans until the further order of court. Upon the issuance of the restraining order an injunction bond in the sum of \$1,500, as required by the court, was executed by the persons aforesaid, as plaintiffs in said action, and by said surety company. It is alleged that thereafter, on or about December 31, 1903, upon the hearing of the order to show cause why the restraining order should not be continued in force pending the suit, the court duly made an order continuing the injunction in force, upon the condition that the plaintiffs in the action should file an additional bond in the sum of \$5,000. A bond in said sum, executed by the same obligors who made the first one, was thereupon duly executed and filed.

It is further alleged that such proceedings were thereafter had in said action that, on or about May 5, 1905, the said Idaho court finally decided that the plaintiffs in the action were not entitled to the injunction, and that a judgment was entered therein in favor of these plaintiffs. The claim for damages herein is based upon an alleged dissipation of the stock of goods and accounts, and destruction of the business of these plaintiffs during the time the said Huffmans were in possession thereof by authority of said injunction orders. The complaint fixes the damages at more than \$12,000. The answers of the defendants admit the issuance of the injunction orders and the execution of the bonds, but they deny that plaintiffs were damaged in any sum. A trial was had before a

Jan. 1908]

Opinion Per HADLEY, C. J.

jury, a verdict was returned in favor of the plaintiffs for the sum of \$750, and judgment was entered in accordance with the verdict. The plaintiffs, and also the defendant Fidelity & Deposit Company of Maryland, have appealed.

The appeal of the plaintiff-appellants is prosecuted upon the contention that the trial court proceeded upon an entirely erroneous theory, or the result which was effected in the case could not have been reached. It is contended that the evidence shows an investment by appellants of \$7,000 in a profitable business; that the business was taken away from the owner by a voluntary wrongdoer through the means of a writ of injunction, and was run and controlled by such wrongdoer for nearly a year and a half, at the end of which time the whole investment of \$7,000 was lost; that for such loss directly caused by the wrongdoer, damages in the sum of \$750 only have been awarded. The appellants have assigned many errors, and an examination of them becomes necessary to determine whether the cause was tried upon an erroneous theory.

It is first assigned that the court erred in permitting the witness Severance to answer the question as to whether it was true that he had made a contract with the Huffmans because he could not agree with them and wanted to get them out of the Severance-Huffman Company. Severance was interested in the profits of the Collins Mercantile Company, the latter being really the appellant Collins. Severance had also sustained business relations with the Huffmans, the same being referred to as the Severance-Huffman Company. When the question to which objection was made was asked Severance, he was being interrogated about an account which was owing from the Severance-Huffman Company to the Collins Mercantile Company, or really to the appellants. The objection was that there was no contract. An examination we think shows that the question refers to a proposed agreement or mere negotiations as descriptive of the reason why it was sought to sever the Huffmans from the company. The contention now

is that permitting the witness to answer must have created a prejudice in the minds of the jury. The answer was "No," which was equivalent to saying that the witness did not enter into such a contract. Since it appears from the context of the record that the thought involved in the question was merely the reason that the Huffmans sought to withdraw, no prejudice could have resulted from the answer of the witness, for the reason that the answer was sufficiently to the effect that there was no contract, which was consistent with the findings of the Idaho court and met the ground specified in the objection.

It is next assigned that the court erred in sustaining an objection to a question asked the witness Severance on re-examination as to the collectibility of the Severance-Huffman company account, which was an account of something more than \$2,000 owing to appellants. The purpose of attempting to show the collectibility of the account was to found damages against the Huffmans for failure to collect it when it is claimed appellants were prevented by the injunction from so doing. The same witness had testified already that this account was not taken into the charge of the Huffmans, and that he knew during all the time of the Idaho litigation that the Huffmans did not in any way claim the control of this account. This showed that the collection of the account was not taken from appellants by the injunction, and the Huffmans cannot therefore be held responsible for failure to collect it. In view of the witness' previous testimony, the matter of the collectibility of the account became immaterial to the issues in the case, and it was not error to sustain the objection.

It is next urged that it was error to sustain an objection to a question asking what the stock of goods brought when sold by the Spokane Jobbers Association. After the injunction was dissolved, a stipulation was made between the parties for joint possession of the store for a time, and later it was turned over to the control of appellants, who placed it in the

Jan. 1908]

Opinion Per HADLEY, C. J.

hands of the Spokane Jobbers Association. In estimating the amount of property, appellants had charged the respondents with the full invoice price of all goods which were turned over at the time of the injunction. Respondents were therefore entitled to credit in the same way for the invoice amount of all that were turned back to appellants. These having been turned over to the Spokane Jobbers Association by appellants themselves, it became immaterial so far as respondents were concerned what prices the goods brought.

It is also contended that it was error to overrule appellants' objection to a question asked a witness as to whether, with a few goods added, the store could have been run longer and all the outstanding accounts collected. This witness was in charge of the stock for the Spokane Jobbers Association which, as we have seen, held it under the direction of appellants. Whatever may be said as to the materiality of the question, no prejudice could have resulted therefrom in view of the answer of the witness. The answer was: "It would be hard for me to say. I could not swear to that."

A number of other errors are assigned upon the admission and rejection of testimony, but while counsel say they do not waive them, they have not discussed them in their brief. The burden is upon appellants to show wherein they have been prejudiced. Errors to be available for reversal must operate to the injury of the complaining party. *Brown Brothers & Co. v. Forest*, 1 Wash. Ter. 202; *Jose v. Stetson*, 20 Wash. 648, 56 Pac. 397. We find no prejudicial error in the particulars mentioned.

It is next contended that the court instructed the jury orally, and that this was error in view of the fact that appellants had seasonably requested written instructions. The record shows that one stenographer was employed by both parties to report the case at the trial, and that she did report it, including the taking of the court's instructions. She was therefore under the control of both parties. The pertinent

part of the statute upon this subject is found in subd. 4 of § 1, Laws 1903, page 119, as follows:

“When the evidence is concluded, either party may request the judge to charge the jury in writing, in which event no other charge or instruction shall be given, except the same be contained in the said written charge; . . . *Provided further*, That whenever in the trial of any cause, a stenographic report of the evidence and the charge or instructions of the court is taken, the taking of such charge or instructions by the stenographic reporter, shall be considered as a charge or instruction in writing within the meaning of this section.”

Appellants contend that, on the authority of *State v. Mayo*, 42 Wash. 540, 85 Pac. 251, the instructions as given by the court in the case at bar were not in conformity with the above statute. In the case cited it was said that there were two stenographers present at the trial taking a report of the case, one employed on behalf of the prosecuting attorney and the other by the defendant. Under such circumstances it was held that the court was not relieved from the obligation to charge the jury in writing, the request therefor having been made. It was stated in effect that, in order to relieve the court of this obligation, the stenographer present must be an official stenographer or one under the direction and control of the court, “so that a copy of the charge could be had if application to the court should be made therefor.” It was held that a stenographer employed by one of the parties only is not so under the control of the court that he can be required to furnish a copy of any part of the proceedings either to the court or to the opposing party. The holding was based upon the ground that the report of a stenographer employed by one party only becomes the private property of that party, which is no doubt correct.

Appellants contend here that the stenographer employed in this case was not under the control of the court and was not an official stenographer. Strictly speaking there is, under

Jan. 1908]

Opinion Per HADLEY, C. J.

our statutes, no such person as an official court stenographer, but a stenographer may be so related to both the parties in a cause as virtually places him under the direction of the court. We think this is true where one stenographer is employed by both parties to report a trial. Such a reporter is under the direction of either party, and if the interest or advantage of either party requires that copies of instructions which the reporter has taken shall be furnished to the court or to such party, the copies must be forthcoming. If the statute quoted is to be given any force at all, it would seem that the court complied with its provisions in this case. The statute was passed with knowledge that we have no official stenographers, and in view of that fact we think it was intended to meet just such cases as the one at bar. This holding in no way conflicts with *State v. Mayo, supra*, the facts of which were materially different from those now before us.

It is contended that the court gave contradictory instructions in that the jury were first told that they must find damages in some amount, either nominal or actual, and a later instruction contained the expression "so that you will bear in mind in finding your damages in this case, if you find any at all," etc. Appellants argue that the above expression conflicts with the first instruction, for the reason that it gave the jury liberty to find no damages whatever. The jury must have understood the court to refer to actual damages when it used the words "if you find any at all," for the whole case had been tried upon the theory that nominal damages were recoverable. That the jury were not misled is evidenced by the fact that the verdict which was returned was for substantial actual damages.

It is next urged that the court erred in instructing that damages under the second or \$5,000 bond must be confined to the matters occurring subsequently to December 31, 1903, the date of that bond. The injunction order, upon which that bond was based, was dated December 29, 1903, and the

instruction also limited the recovery of damages under the first or \$1,500 bond to the period between the dates of December 23 and 29, inclusive. It is therefore argued that the instruction failed to permit any recovery of damages for December 30. Appellant's assignment of error is, however, directed to the point that the instruction erroneously directed that no recovery could be had upon the \$5,000 bond between the dates of December 23 and 29, and no reference is made to failure to cover the date of December 30. The exceptions to the instruction also fail to call specific attention to this point, and we think appellants are not in position to urge it. But in any event, if the question were properly before us, appellants have not shown from anything in the record that there was any change of conditions as between the 29th and 31st of December from which any particular damages were recoverable for December 30, the omitted day, and no prejudice therefore appears.

It is next assigned that the court erred in instructing that the jury should not allow any damages by way of attorney's fees, for the reason that there was no evidence showing that attorney's fees were incurred or paid by reason of the injunctions, separate and distinct from the other issues involved in the case. We believe the instruction was not erroneous in view of the evidence and history of the injunction case. It is well established that the recoverable fees must be for attorney's services rendered in securing a dissolution of the injunction, distinct from any services rendered in connection with the main case. A restraining order was issued which contained an order to show cause why a temporary or interlocutory injunction should not issue pending the litigation. No motion was made to dissolve the restraining order, but on the return day of the order to show cause appellants simply sought to prevent the issuance of a temporary injunction. No motion was made to dissolve the latter order, and the attorney's services thereafter rendered were upon the trial of

Jan. 1908]

Opinion Per HADLEY, C. J.

the issues of the main case which resulted merely incidentally in the dissolution of the injunction. Under the rule of law upon this subject, we therefore think no services were rendered by attorneys for which fees are recoverable as damages. *Danahue v. Johnson*, 9 Wash. 187, 37 Pac. 322; *White Pine Lumber Co. v. Aetna Indemnity Co.*, 42 Wash. 569, 85 Pac. 52.

Several errors are assigned upon certain instructions to the effect that the court proceeded upon a wrong theory of the case in considering the business of appellants and that conducted by the Huffmans as one continual business, and instructed that the business, stock, and accounts should be considered as they were at the date the Huffmans took possession, and also as they were at the date they returned possession. Appellants contend that their business, as it was when the Huffmans took possession, should be considered alone, and that they have nothing to do with stock and accounts added during the Huffmans' possession. The evidence shows, however, as already stated, that on the return of the stock appellants took possession of everything and turned all over to the Spokane Jobbers Association, which disposed of the whole without any segregation of the old from the new. We therefore think the court did not err in its theory of the instructions, and we find no prejudicial error as to any other instructions given or refused to appellants. We believe the cause was fairly submitted to the jury and that, inasmuch as the jury were the triers of the facts, their verdict should stand so far as plaintiff-appellants are concerned.

Referring now to the cross-appeal of the defendant-appellant, Fidelity & Deposit Company of Maryland, we find ten distinct assignments of error, all relating to the instructions given or refused. This opinion has already been extended to such an inordinate length by reason of the many questions raised by the plaintiff-appellants, that we find it necessary to abbreviate the discussion of the cross-appellant's appeal. A

specific discussion of each assignment is unnecessary since the points involved may be more generally stated. It is urged that the court erroneously assumed in its instructions that specific damages were shown as resulting from the temporary restraining order. That order it will be remembered continued from December 23 until December 29, inclusive, when the order for an injunction *pendente lite* was issued. It is contended that no specific damages were shown as resulting from the first order, and that only nominal damages were recoverable upon the \$1,500 bond. The jury were specifically told that they should allow no actual damages upon that bond except such as accrued between December 23 and 29. Under the evidence we think it was for the jury, and not for the court, to say whether any actual damages did accrue. The court did not assume to say that actual damages had been in fact proven, but said in reference to actual damages that, if the jury found "any at all," they could allow no damages on the \$1,500 bond except such as accrued on and between the dates aforesaid. We think there was no error in this particular.

It is further urged that the cross-appellant is not liable upon the second or \$5,000 bond, for the reason that no injunction was issued and served. The order for the injunction *pendente lite* contained the following:

"The cause was argued to the court by respective counsel, and the court being fully advised in the premises orders that the injunction as prayed for by the plaintiffs in their verified amended complaint on file herein be granted, and that the said injunction be continued until the hearing of this cause upon the merits."

It was further ordered that upon giving a bond for \$5,000, "an injunction forthwith issue." It is argued that, under the terms of the order, it became necessary, after the bond was filed and approved, to issue a formal injunction order, and that inasmuch as this was not done, there was in fact no injunction and therefore no liability upon the bond. We

Jan. 1908]

Opinion Per HADLEY, C. J.

think the point is not well taken. The order shows that the court granted by injunction the specific relief asked in the amended complaint. This was definite and certain, and could not have been misunderstood. The words granting the injunction were in the present tense, and were manifestly intended to operate as the injunction order itself upon the filing and approval of the necessary bond. It is true the order afterwards further says that upon the filing and approval of a bond in the sum specified, "an injunction forthwith issue," but in the light of the whole context and the circumstances the words were manifestly intended in the sense that the injunction, which had been previously granted in the order, should forthwith be in effect upon the filing and approval of the bond. The court therefore did not err when it instructed the jury that damages were recoverable under the \$5,000 bond, if any were shown to have accrued during the period covered by it.

For the foregoing reasons we conclude that the contentions upon both appeals should be denied, and the judgment is affirmed.

No costs shall be recovered by either appellant.

CROW, ROOT, MOUNT, and FULLERTON, JJ., concur.

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Jan. 1908]

Opinion Per HADLEY, C. J.

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For the foregoing reasons we conclude that the contentions upon both appeals should be denied, and the judgment is affirmed.

No costs shall be recovered by either appellant.

Crow, Root, Mount, and Fullerton, JJ., concur.

[No. 6857. Decided January 7, 1908.]

THE STATE OF WASHINGTON, *on the Relation of Thomas F.  
Conlan, Respondent*, v. OUDIN & BERGMAN FIRE CLAY  
MINING AND MANUFACTURING COMPANY,  
*Appellant*.<sup>1</sup>

CORPORATIONS—DISSOLUTION—SURRENDER OF PRIVILEGES—STATUTE—CONSTRUCTION. A dissolution of a corporation is authorized under Bal. Code, §§ 5780, 5789, 5790, providing that an information may be filed against a corporation which does or omits acts amounting to a surrender of its privileges, and shall be dissolved if found guilty of unlawfully exercising any office, where it appears that the owner of one-half of the stock assumed to represent the corporation without authority, destroyed its business through negligence, is conducting a rival business, and refuses to elect or help elect a trustee, by reason whereof no business can be legally transacted.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered November 30, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to dissolve a corporation. Affirmed.

*Gallagher & Thayer*, for appellant.

*R. L. Edmiston and R. J. Danson*, for respondent.

Root, J.—This action was instituted for the purpose of dissolving the defendant corporation. From a decree of dissolution this appeal is prosecuted.

The defendant was incorporated under the laws of Washington, in April, 1893, with a capital stock of \$150,000, divided into fifteen hundred shares of the par value of \$100 each. No by-laws appear to have been adopted by the corporation. The trial court finds that, on the 17th of April, 1903, the relator herein became the owner of seven hundred

<sup>1</sup>Reported in 93 Pac. 219.

Jan. 1908]

Opinion Per Root, J.

and fifty shares of the stock, and that Eva M. Oudin and Charles P. Oudin were the owners of the other seven hundred and fifty shares; that the stock is still owned by them in the respective amounts mentioned. At that time the relator obtained his stock from one Bergman, who was one of the trustees. The said Charles P. Oudin was the other trustee, the articles providing for only two. Shortly after the date above mentioned, a meeting of the stockholders was called to elect a trustee to fill the vacancy caused by the withdrawal of Bergman from the company. At the meeting all of the stockholders were present. Seven hundred and fifty shares were voted for this relator and seven hundred and fifty shares for Eva M. Oudin, wife of Charles P. Oudin. As neither received a majority, no election was had. Since said date no election has taken place and the corporation has had but one trustee, and consequently been unable to legally transact any corporate business.

The court finds that said Oudin and wife refuse to elect or to help elect, or to consent to the election of, said relator as a trustee, and declare that they will never consent to relator occupying any official position or exercising any official authority or control with or over the corporation. The court finds that said Charles P. Oudin has assumed to act on behalf of and to represent said corporation without authority, and that under his management and control the corporation has suffered great financial reverses and loss, and that by reason of his great carelessness the factory and manufacturing plant of the corporation was destroyed by fire and the business destroyed; and that said Oudin has ever since April, 1903, been engaged in organizing and building up a rival fire-brick, sewer-pipe and clay manufacturing plant, exercising the management and control thereof, and wholly absorbing the business patronage of the defendant corporation. No statement of facts or bill of exceptions is brought up. Hence the findings cannot be questioned. Appellant urges that the facts

the same quarter section, while the southwest forty thereof is owned by one William R. Stephens. Near their west line and about nine hundred feet south of the appellant's south line, was situated respondents' barn above referred to. A little west of due north of respondents' barn and just within his south line, appellant had a slashing consisting of fallen trees and brush piled in heaps, covering an area of two or three acres. Between this slashing and respondents' barn was a strip of green timber about seven hundred and fifty feet in width and a creek measuring about forty feet from water's edge to water's edge, and about eighty feet from bank to bank.

Appellant set fire to his slashing shortly before one o'clock p. m., on August 21, 1906. There had been no rain for nearly two months, and everything in that vicinity was very dry. Appellant offered testimony to the effect that, on the afternoon of August 20 and the forenoon of August 21, thunder was heard in the distance and there were appearances of rain. At the time the fire was started there was little if any wind. Later a north wind sprung up which increased in force to such an extent that sparks, embers, and particles of burning moss were carried southward across the creek and dropped upon respondents' premises, starting fires in many places, where they happened to drop upon dry stubs, logs, brush, or other combustible material. Some of these particles, coming either from the original fire or from small fires started therefrom, alighted on and around respondents' barn, and respondents, assisted by neighbors, fought against and extinguished many of these small fires that threatened the barn on this afternoon and evening. Respondents remained up a large part of that night watching and fighting the fire, but finally retired, believing that their premises were out of danger.

On the next day the fire smouldered in logs and stubs on the lands west and north of respondent's place, and several

Jan. 1908]

Opinion Per Root, J.

small fires were claimed by respondents to have been extinguished by them near their barn on this day. There were a few dead snags and stubs, including one about one hundred and fifty feet tall, to the northwest about one hundred and twenty feet from respondents' barn, in which fires smoldered all day on the 22d. On the evening of that day respondents, believing that the barn was no longer in danger, replaced therein certain movable property which they had taken out when they regarded the barn in danger. Respondents retired about eleven o'clock that night, and were awakened about four in the morning by the burning of their barn. There was not very much wind at this time, and it could not be told with much certainty as to where the sparks came from that ignited the barn, if ignited thereby. The case was tried without a jury. The trial judge found that the appellant was negligent, and held him liable in damages for the value of the barn and the hay therein contained. He refused to allow a recovery for the personal property which the respondents had removed from the barn during the day and replaced on the evening before the barn burned, holding that they were guilty of contributory negligence in replacing this property in the barn under the circumstances. From the judgment entered, this appeal is prosecuted by the defendant.

The appellant claims that no negligence is established as against him; that he had a right to set the fire, and that his manner of managing it after it was set was not such as to charge him with negligence. The setting out of a fire is not in itself an act of negligence. In a country like this, where it is necessary to clear land and burn brush and stumps thereupon, it is appropriate that fires should be employed at proper times and under suitable conditions; but when we remember that this appellant started this fire at a time when there had been no rain for nearly two months, and when much of the surrounding neighborhood contained combustible material that could be readily ignited by the sparks that would natur-

ally fly from the burning of such a large amount of brush, we cannot say that the trial court was in error in adjudging the defendant guilty of negligence. The defendant may possibly have believed that it would soon rain, and he doubtless relied much upon the strip of green timber and the creek to prevent the fire spreading in the direction of respondents' premises. He, however, knew there was no certainty of rain, and he must have known that the burning of so much brush would tend to increase the wind and scatter sparks to a long distance from the location of the fire. This happened, and many fires were started upon the premises of respondents and their neighbor to the westward. These fires endangered respondents' premises on the 21st, and there were numerous places still burning or smouldering all day on the 22d. Appellant claims that the violence of the wind was unexpected and could not reasonably have been anticipated; that he had no reason to suppose that the wind would blow hard enough to carry the sparks across the green timber and creek. There was evidence, however, to show that many of the sparks ignited the particles of moss, stumps, and other combustible material among the green timber and burned in numerous places therein. Having seen that the fire had been carried from his premises over to that of his neighbors, it was incumbent upon him to do all that could be reasonably expected of a man in such situation to prevent any injury coming from said fires to respondents' property. The evidence did not convince the trial court, and does not convince us, that he did so.

It is strenuously urged that the finding of the trial court that the respondents were guilty of contributory negligence in replacing in their barn on the evening of the 22d the personal property which they had theretofore removed when in fear of a fire, is inconsistent with the allowance to the respondents of damages for loss of the barn and the hay therein contained. We do not think it is necessarily inconsistent.

Jan. 1908]

Dissenting Opinion Per MOUNT, J.

Neither the barn nor the hay therein could be readily removed. As to the other property, it could be and was removed, but was replaced under conditions which the trial court did not believe justified its return, although the danger was not so imminent as to require respondents to stay up all night watching the barn. It therefore declined to allow them any recovery for that property which would not have been destroyed had it not been so returned to the barn.

There is considerable conflict in the evidence, especially upon matters of opinion as given by the various witnesses. While the finding of the trial court or judge in a case tried without a jury does not stand as a verdict and is not to the same extent binding upon this court, yet, in the face of a conflict of evidence, this court will recognize the fact that the trial court, in being able to see and hear the witnesses personally, has advantages which this court does not have, and will not disturb the finding of the lower court unless well satisfied that it was in error. We are not so convinced in this case.

The judgment will therefore be affirmed.

FULLERTON, RUDKIN, and DUNBAR, JJ., concur.

HADLEY, C. J., and CROW, J., took no part.

MOUNT, J. (dissenting)—I think the evidence fails to show that the fire which destroyed respondents' barn originated from the fire set out by appellant, or from any negligence of appellant. I therefore dissent.

[No. 6987. Decided January 7, 1908.]

EMMA F. STONE *et al.*, Appellants, v. SMITH-PREMIER  
TYPEWRITER COMPANY *et al.*, Respondents.<sup>1</sup>

NEGLIGENCE — DANGEROUS PREMISES — TRAPDOOR — CONTRIBUTORY NEGLIGENCE. A customer in a store is not guilty of contributory negligence, as a matter of law, in falling down a trapdoor, at the back of a storeroom near a counter where goods were displayed, where she stepped back from the counter to make room for a clerk, and did not know of the existence of, or see, the trapdoor.

SAME—PARTIES LIABLE. In an action by a customer of one of two occupants of a storeroom against two occupants of the premises, for damages sustained in falling down a trapdoor at the side of the room visited by the customer, a nonsuit is properly directed as to the occupant of the other side of the room, where it is not shown that he had any control over the trapdoor other than a mere license to use it, and it is not shown who left the door open.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered May 10, 1907, in favor of the defendants, dismissing an action for personal injuries sustained in falling down a trapdoor stairway. Affirmed in part and reversed in part.

*Samuel R. Stern*, for appellants.

*J. D. Campbell*, for respondent Smith-Premier Typewriter Company.

*S. P. Domer*, for respondent Buckley.

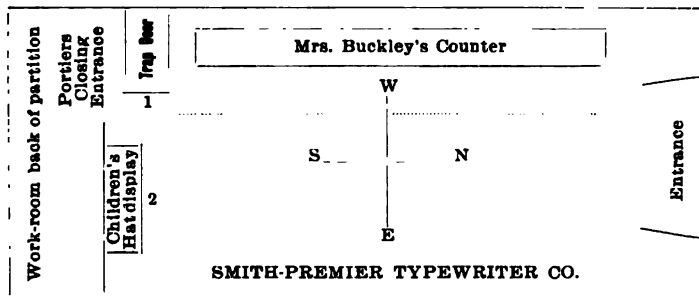
Root, J.—Appellants brought this action to recover damages for personal injuries received by Emma F. Stone in falling down a trapdoor stairway leading to a basement underneath a storeroom occupied by respondents, on the south side of Riverside avenue, in the city of Spokane. At the close of plaintiffs' evidence, the case was dismissed as to both the defendants. From the judgment of dismissal, this appeal is taken.

<sup>1</sup>Reported in 93 Pac. 209.

Jan. 1908]

Opinion Per Root, J.

Respondent Buckley occupied the west side of the store-room with millinery goods. The east side was occupied by the typewriter company with desks and typewriting machines and material. At the rear of the store was a work-room used by Mrs. Buckley. This room was entered through a door on the west side covered by portiers. A counter extended along the west side of the store, and between the same and the portiers was a trapdoor which, when raised, left an opening twenty-seven inches wide and eight feet long. The south end of this opening extended beyond the outer line of Mrs. Buckley's counter about fourteen inches. The following diagram will show substantially the situation at the time of Mrs. Stone's injury:



1—Where Mrs. Stone fell down stairway.

Dotted Line—Mrs. Stone's course down aisle.

2—Where clerk stood showing hats.

The distance from the trapdoor to the partition was 14 inches.

Mrs. Stone entered the store and stopped at the counter to look at some hats. After standing there some time, she passed on to another counter at the rear of the store next to the workroom. In so doing she passed by the trapdoor. She did not see the trapdoor or opening, and testifies that she had never seen them and did not know of their existence, although she had traded in the store at various times during the past four years. While looking at hats at the rear of the store,

she stepped back to make room for a clerk who was reaching over for a hat, and in doing so stepped into the opening and fell down the stairway, sustaining severe injuries. The trial court took the view that Mrs. Stone must have seen, or might have seen, the opening, and that she was therefore guilty of contributory negligence which defeated her right of action.

We are unable to reach this conclusion as a matter of law. We think that, under the circumstances shown, it was for the jury to say whether or not she was guilty of negligence. The law requires a storekeeper to maintain his storeroom in such a condition as a reasonably careful and prudent storekeeper would deem sufficient to protect customers from danger while exercising ordinary care for their own safety. A customer entering a store of this character is required to use that degree of care and prudence which a person of ordinary intelligence, care and prudence would exercise under the same circumstances. As to whether Mrs. Stone exercised that degree of care and prudence in this instance is a question upon which we think reasonable minds might differ. This being true, it became a question of fact for the jury. We think the facts herein shown clearly distinguish this case from that of *Dunn v. Kemp & Herbert*, 36 Wash. 183, 78 Pac. 782, which is relied upon by respondents.

It is urged, however, that the judgment should be affirmed as to the typewriter company, and we think this contention must be upheld. The trapdoor opening was upon the side of the store used by Mrs. Buckley. While both she and the typewriter company had goods stored in the basement and occasionally used the trapdoor opening, yet it does not appear that the typewriter company had any control over the trapdoor other than a mere license to go down the opening when necessary. It does not appear how long the trapdoor had been open, nor who left it open at the time of this accident, which occurred between five and six in the afternoon. Mrs. Stone testified that she did not see any one in the part of the

Jan. 1908]

• Opinion Per Curiam.

store occupied by the typewriter company, and there is no evidence that any one was there at that time. We do not think the evidence establishes any liability against the company.

The judgment of the honorable superior court will be affirmed in so far as it affects the typewriter company, and reversed and remanded for further proceedings in so far as it affects the respondent Buckley.

HADLEY, C. J., CROW, MOUNT, and FULLERTON, JJ., concur.

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[No. 6740. Decided January 8, 1908.]

JOSEPH DUTEAU, *Respondent*, v. R. W. BARTO, *as Administrator of the Estate of George M. Godfrey, Deceased, et al., Appellants*.<sup>1</sup>

APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence where the trial judge saw and heard the witnesses, will not be disturbed on appeal, unless clearly unsupported by the weight of competent evidence.

Appeal from a judgment of the superior court for King county, Tallman, J., entered December 22, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Walter B. Beals and Blaine, Tucker & Hyland, for appellants.

Arthur C. Dresbach and F. A. Gilman, for respondent.

PER CURIAM.—This action was commenced by Joseph Duteau against George M. Godfrey and Lee Melleur, to recover \$1,263, less \$185.20 paid, for services rendered by the

<sup>1</sup>Reported in 93 Pac. 220.

plaintiff to the defendants from May, 1904, to July 11, 1905, as their housekeeper and cook, and also in caring for and nursing the defendant Godfrey at times when he was not in a condition to care for himself. The defendants, after denying the allegations of the complaint, alleged that, in May, 1904, the plaintiff, being unable to do hard manual labor, offered to do the housework and cooking for the defendant Godfrey for his lodging and board; that his offer was accepted; that in July, 1904, the defendant Melleur went to live with plaintiff and Godfrey under this arrangement, and that the defendants were not indebted to the plaintiff in any sum whatever. Prior to trial the defendant Godfrey died, and his administrator having been substituted as a party defendant, amended pleadings were filed, raising the same issues, with the additional allegation made by the administrator that Godfrey during his lifetime had loaned \$185.20 to the plaintiff, no part of which had been paid, and for which he asked judgment. The trial judge made findings upon which judgment was entered in favor of the plaintiff against both defendants for \$397.57 and costs. The defendants have appealed.

No question of law is raised on this appeal, appellants' controlling contention being that the findings and judgment are not supported by the evidence. We have repeatedly said that, when a trial judge has tried an issue of fact, has seen the witnesses, heard them testify, has been in a position to pass upon their credibility, and has on conflicting evidence made findings of fact, this court will not, on a trial *de novo*, disturb such findings, unless they are clearly unsupported by the weight of competent evidence. Having carefully read the entire record, we have concluded that the evidence, although conflicting, is amply sufficient to sustain each and all of the findings made, and the judgment entered thereon.

The judgment is affirmed.

Jan. 1908]

Statement of Case.

[No. 6850. Decided January 9, 1908.]

J. O. HOUSEKEEPER, *Appellant*, v. H. W. LIVINGSTONE,  
*Appellant*, and M. J. MALONEY *et al.*, *Respondents*.<sup>1</sup>

MECHANICS' LIENS—LEASED PREMISES — PARTIES LIABLE — LIMITATION OF LIABILITY—NOTICE—SUFFICIENCY. Where permanent repairs upon leased premises are permitted and made with the knowledge of the owner of the fee, his interest is subject to a mechanics' lien therefor unless he expressly limited his liability by notifying the lien claimant, and such limitation is not made by merely sending the claimant to the lessee in an endeavor to get the lessee to pay for part of the repairs.

APPEAL — REVIEW — EFFECT OF STIPULATION — DISCRETION — MECHANICS' LIENS—ATTORNEYS FEES. Where the parties stipulated that the court should fix the amount of attorney's fees on the foreclosure of a mechanics' lien, without the introduction of any evidence, the action of the court cannot be reviewed on appeal except for abuse of powers; and no such abuse appears from the allowance of \$150 in a sharply contested action involving \$340.

MECHANICS' LIENS — LEASED PREMISES — LIABILITY OF TENANTS. The evidence is sufficient to sustain findings that repairs upon leased premises were not made at the request of the tenants, so as to subject their interests to a mechanics' lien, where it appears that the lessor agreed to fully repair the building as rapidly as possible and the lessees simply demanded that the repairs be made without further delay or they would get someone else to make them.

FULLERTON, J., dissenting.

Appeal from a judgment of the superior court for Whitman county, Miller, J., entered January 19, 1907, upon findings in favor of the defendant lessors, after a trial on the merits before the court without a jury, in an action to foreclose a mechanics' lien. Affirmed.

*McCroskey & Canfield*, for appellant Housekeeper.

*John Pattison*, for appellant Livingstone.

*J. N. Pickrell*, for respondents Maloney.

<sup>1</sup>Reported in 93 Pac. 217.

HADLEY, C. J.—This is an action to foreclose a mechanics' lien against a hotel in Colfax, Whitman county. The action was brought by J. O. Housekeeper against H. W. Livingstone and M. J. Maloney and wife. Livingstone was the owner of the real estate and Maloney occupied it as a tenant under a lease. A fire had seriously damaged the building and somewhat extensive repairs were made thereon by Housekeeper, at the request of Livingstone, the owner of the fee. As a part of the repairs made by Housekeeper, certain materials and labor were furnished by him in the way of kalso-mining and glazing in parts of the building. The controversy in this case arises over the last-named items. Housekeeper claims that he made the repairs at the request of both Livingstone and Maloney, and that both the fee and the leasehold estate are chargeable with the cost thereof. Livingstone claims that he expressly limited his liability for these particular repairs to \$75; that he told Housekeeper if the cost exceeded said sum he must look exclusively to Maloney for the excess. Maloney denies that he directed any part of the work to be done on account of his liability, and maintains that the entire repairs were authorized and directed by Livingstone. As lessee Maloney therefore contends that Livingstone's estate in fee is alone subject to a lien for the whole amount, and that the leasehold estate cannot be subjected to the lien for any part of the expense. The decree of the court was that the lien for the whole amount shall be enforced against the interest of Livingstone, but not against that of Maloney, and Maloney and wife were dismissed from the action. It was provided that, in the event of a sale under the decree, the purchaser shall be let into possession subject to the possession of Maloney and wife as lessees. From the decree the defendant Livingstone and the plaintiff Housekeeper have both appealed.

Appellant Livingstone contends that the court erred in finding that the labor and material in excess of the value of

Jan. 1908]

Opinion Per HADLEY, C. J.

\$75 were furnished at his request. There was no writing between Livingstone and Housekeeper concerning the work, and it is somewhat difficult to determine from the evidence of the conversations between them the full legal effect thereof. Housekeeper testified that Livingstone told him to go to Maloney and tell him that Livingstone would pay \$75 upon the kalsomining and glazing, and that if Maloney desired more work done than that amount in value, he must pay for it himself. Housekeeper, however, says that Livingstone at no time said that he would in no event pay the excess of \$75, but that he merely asked Housekeeper to so tell Maloney. Livingstone's purpose appeared to be to get an agreement from his tenant Maloney to pay for part of the repairs, and this he sought to do by sending Housekeeper to Maloney. But we believe the testimony as a whole does not establish that Livingstone limited his own liability as between himself and Housekeeper. Whatever may have been his intention as between himself and Maloney, he nevertheless permitted Housekeeper to go ahead and do the work to the betterment of his property without expressly telling Housekeeper that the liability was limited to less than the full value. Under such circumstances, we think Livingstone's liability was not limited to \$75. The property belonged to Livingstone, and the primary liability to pay for all the permanent improvements made with his knowledge and without his objection was upon him, unless he so distinctly and clearly limited his liability that Housekeeper could not have reasonably understood it otherwise. After a careful examination of the evidence, we think we would not be warranted in disturbing the court's finding that the material and labor were furnished at Livingstone's request. The same is also true as to the finding concerning the value of the labor and material.

It is next assigned that the court erred in allowing the sum of \$150 as attorney's fees. The reasonable value of the labor and materials was found to be \$340.37, and the decree is for

the enforcement of the lien for that amount and for costs. Considering the amount involved, it is contended that the fee allowed was too large. We think the record is such that the question of excessive attorney's fees is not reviewable here. All parties stipulated at the trial that the court should fix the amount of attorney's fees without the introduction of any evidence upon the subject, and the amount was so fixed without evidence. Under such circumstances there is nothing for the appellate court to review. To be sure, if it manifestly appeared that the trial court abused its powers in the premises, this court might be warranted in so holding. Such a case is not presented here, however. In the absence of any evidence upon the subject and in view of the stipulation to abide the court's decision, together with the evident sharply contested litigation and necessity for somewhat extensive legal services as shown by the record, the case before us does not present a manifest abuse of power. So far as the appellant Livingstone is concerned, we think the judgment should be affirmed.

Referring now to the appeal of Housekeeper, we find that the assignments of error relate to the failure of the court to find that the respondents Maloney and their leasehold estate are liable. It is contended that Maloney requested the improvements as well as Livingstone. The evidence, however, shows that Livingstone repeatedly said to Maloney and others, after the fire, that he would fully repair the building as rapidly as it could be done. When Housekeeper delivered Livingstone's message to Maloney about the proposed \$75 limitation, Maloney replied, in substance, that Livingstone had always said he would repair as rapidly as possible, and Housekeeper would make the repairs in question as well as others he had already made; that he, Maloney, was greatly inconvenienced by reason of the delay, and he demanded that Housekeeper should go ahead and complete the repairs or he would get someone else to make them. The entire con-

Jan. 1908]

Statement of Case.

versation and the whole evidence together convinces us that Maloney simply demanded that Housekeeper should proceed on the authority of Livingstone, as had been all the time contemplated, or he, Maloney, would see that someone else did the work. The court heard the testimony of all these persons, and we think under the evidence that we should not say it was error to refuse to find that Maloney requested the work done on his own responsibility. The dismissal of the Maloneys from the case followed as a result, and was therefore not erroneous.

The contentions upon both appeals are denied, and the judgment is affirmed. Housekeeper shall recover his costs in the Livingstone appeal, and the Maloney<sup>s</sup> shall recover their costs in the Housekeeper appeal.

MOUNT, CROW, and ROOT, JJ., concur.

DUNBAR and RUDKIN, JJ., took no part.

FULLERTON, J. (dissenting)—I think there was no obligation on the part of the appellant Livingstone to pay a larger sum than \$75, and that the decree insofar as it requires him to pay in excess of this amount is erroneous.

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[No. 6997. Decided January 9, 1908.]

CHRISTINA McLEAN, *Respondent*, v. LESETTE E. LESTER  
*et al.*, *Appellants*.<sup>1</sup>

TAXATION — FORECLOSURE — SUMMONS — SUFFICIENCY. Upon the foreclosure of a tax certificate, a summons by publication which fails to state the year of the date of the first publication is too indefinite and uncertain to authorize a judgment of default.

Appeal from a judgment of the superior court for King county, Frater, J., entered February 9, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the

<sup>1</sup>Reported in 93 Pac. 208.

court without a jury, in an action to vacate a tax judgment. Affirmed.

*William C. Keith*, for appellants.

*Ira A. Campbell*, for respondent.

MOUNT, J.—This action was brought by the respondent to set aside a judgment foreclosing a delinquent tax certificate and also a tax deed based thereon. Upon a trial a judgment was entered as prayed for in the complaint. The defendants appeal.

It is necessary to notice but one of the questions presented, because upon that question alone the judgment appealed from must be affirmed. It appears that, in the proceedings to foreclose the delinquent tax certificate, service was attempted to be made upon the defendants by publication. No other service was made. The summons as published in that case notified the defendants "to appear within sixty days after the date of the first publication, to wit, within sixty days after the 23d day of December, in the above named court, and defend this action or pay the amount due, together with costs, and in case of your failure so to do the plaintiff will apply for a judgment foreclosing the lien of said taxes and costs against the real property above described. G. W. Tracie, plaintiff. Daniel Lamson, attorney for plaintiff. Room 9 Roxwell Block, City. First publication December 23,—7t." Upon this summons a judgment of default was entered, and the lot in question sold. The summons did not state the year when the defendants in that action were required to appear. Under repeated rulings of this court this summons was too indefinite and uncertain to base a judgment of default upon. *Owen v. Owen*, 41 Wash. 642, 84 Pac. 606, and cases there cited.

Appellants argue that the date of the newspaper and the fact that the certificate of delinquency was issued in the year 1904, are sufficient to make the summons definite. The date

of the newspaper is no part of the summons, nor does the fact that the certificate of delinquency was issued in the year 1904 necessarily show that the case was brought in that year. The summons itself should state the time within which the defendants were required to appear. It did not do so, and was therefore insufficient.

The judgment appealed from must therefore be affirmed.

HADLEY, C. J., FULLERTON, and CROW, JJ., concur.

DUNBAR and ROOT, JJ., took no part.

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[No. 6907. Decided January 9, 1908.]

THE STATE OF WASHINGTON, *on the Relation of Oregon &  
Washington Railroad Company, Appellant*, v. D. R.  
ABRAHAM *et al.*, *Respondents*.<sup>1</sup>

PUBLIC LANDS—TIDE LANDS—VACATION OF PLATS—STATUTES—REPEAL. The county commissioners have no jurisdiction to vacate plats of tide lands, under Laws 1903, p. 139, conferring authority upon them to vacate plats generally; since, if such law applied to tide land plats, it was superseded two days later by Laws 1903, p. 239, conferring power upon the state board of land commissioners to vacate plats of tide lands.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 23, 1907, in favor of the defendants, denying an application for a writ of mandate, to compel a hearing upon an application to vacate a plat of tide lands. Affirmed.

W. W. Cotton, H. F. Conner, and John P. Hartman, for appellant.

Kenneth Mackintosh, E. B. Herald, and A. J. Tennant, for respondents.

<sup>1</sup>Reported in 93 Pac. 325.

FULLERTON, J.—On August 28, 1906, the appellant, being then the owner of certain uplands situated in King county (lying outside of the limits of any incorporated city or town), which had been platted into lots, blocks, streets and alleys, and recorded under the name of Ladd's Factory Sites, and being the owner also of certain tide lands which had been theretofore platted into lots, blocks, and streets by the Board of State Land Commissioners, petitioned the county commissioners of King county to vacate the plats, assigning as a reason therefor that it had become the owner of all the property the plat of which it sought to vacate, and that its interests alone would be affected by the vacation, and that it desired the vacation in order that it might use the property for terminal grounds of its railroad then in the course of construction. The county commissioners assumed jurisdiction and granted the petition insofar as it related to the uplands, but declined to act upon that portion of the petition relating to the tide lands, on the ground that it had no jurisdiction to vacate, modify, or otherwise change plats of tide lands made by the board of state land commissioners. The appellant thereupon sued out of the superior court of King county a writ of mandamus commanding the county commissioners to reinstate the proceedings and proceed with the hearing of the petition, or show cause at a date fixed by the court why they had not done so. The commissioners appeared at the hearing and demurred to the application for the writ, which demurrer the trial court sustained, and dismissed the proceedings. From the judgment of dismissal, the railroad company appealed to this court.

The appellant contends that power to vacate plats of tide lands is vested in the board of county commissioners by the act of March 14, Laws 1903, p. 139. The part of the act relied upon being the first section thereof, which reads as follows:

"That whenever three-fourths in number and area of the owners of any townsite, city plat or plats, addition or addi-

tions, or part thereof, shall be desirous of altering the plat or plats, replatting or vacating the same or any part thereof, they may prepare a plat or plats, showing such alterations or replat, drafted upon a copy of the existing plat or plats, or that portion desired to be altered, replatted or vacated, and file the same with the clerk of the board of county commissioners, or city council having jurisdiction of the establishment or vacation and control of the streets to be affected, accompanied with a petition for the change desired."

The county commissioners contend that jurisdiction to vacate tide land plats is vested in the board of state land commissioners by the third section of the act of March 16, 1903, Laws 1903, p. 239. That section is as follows:

"Whenever all the owners and other persons who have a vested interest in the lands abutting on any street, alley or other public place, or any portion thereof, in any of the state granted, tide or shore lands lying outside of the limits of any incorporated city or town which have been platted, or which hereafter shall be platted, shall petition the board of state land commissioners, by filing a petition therefor with the commissioner of public lands, the board of state land commissioners is authorized and empowered to vacate any such street, alley or public place, or part thereof, and all such streets, alleys and other public places and portions thereof which shall be so vacated shall be platted and appraised in the manner provided for the platting and appraising of similar lands: *Provided*, That where the area of such streets, alleys or other public places so vacated may be determined from the plat already filed as provided by law it shall not be necessary to survey said street, alley or other public place so vacated, but the area thereof may be determined from such plat already filed."

We are of the opinion that the contention of the board of county commissioners must prevail. While the act relied upon by the appellant, if it stood alone, might be construed as broad enough to vest in the board of county commissioners power to vacate plats of tide lands made by the board of state land commissioners, yet it is evident that the legislature did not so intend, for the reason that two days later they vested

this very power in another board. Nor can the jurisdiction be held to be concurrent. If the first act did grant the power contended for to the board of county commissioners, it was superseded in that respect by the subsequent act, under the familiar rule that an act covering the subject-matter of a former act without express words of reservation supersedes the former act insofar as it conflicts with it.

The judgment of the lower court is right and must be affirmed. It is so ordered.

HADLEY, C. J., MOUNT, and CROW, JJ., concur.

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[No. 6922. Decided January 9, 1908.]

THE STATE OF WASHINGTON, *Respondent*, v. WILLIAM  
CONSTANTINE, *Appellant*.<sup>1</sup>

WITNESSES—CREDIBILITY.—INTEREST OF WITNESS—EVIDENCE—ADMISSIBILITY. Upon a trial for assault with intent to murder, a complaint in a civil action brought by the complaining witness against the accused to recover damages is properly excluded as immaterial, where the fact of the bringing of the suit had already been shown for the purpose of affecting the interest and credibility of the complaining witnesses.

SAME—CONTRADICTION OF WITNESS—CRIMINAL LAW—SUPPRESSION OF EVIDENCE. Since an attempt to suppress evidence by paying money to the prosecuting witness may be shown as a corroborative circumstance against the defendant, it is error to refuse to allow the defendant to rebut evidence of such an attempt by contradicting evidence that a certain person had made such an offer on behalf of the defendant.

SAME—IMPEACHMENT—LAYING FOUNDATION FOR CONTRADICTION. Where the prosecuting witnesses had testified to an attempt made by an emissary of the defendant to suppress his testimony by the payment of money, it is not necessary to lay the usual foundation for the impeachment of his evidence by calling attention of the witnesses to any particular conversation, time, and place, but he may be impeached by merely showing that the matter testified to is untrue.

<sup>1</sup>Reported in 93 Pac. 317.

Jan. 1908]

Opinion Per FULLERTON, J.

**CRIMINAL LAW—DEFENSES—INSANITY—EVIDENCE.** Upon a defense of insanity, where the state sought to show a rational state of mind at a certain time, by a particular statement made by defendant to his daughter, it is error to exclude evidence offered by the defendant as to his daughter's statement to him immediately preceding.

**SAME—OPINION EVIDENCE—MENTAL CONDITION.** Upon an issue as to the sanity of the accused, a nonexpert witness may give his opinion as to the mental condition of the defendant in his own language; and it is error to strike out an answer that witness could not say whether he was sane or insane but that "his mind was disordered I should say."

**SAME—INSANITY—EVIDENCE.** Upon the defense of insanity claimed to have been brought about by complaints made to him by the defendant's daughter respecting trouble with her husband, it is error to refuse to permit the daughter, who had detailed certain complaints made, to state whether that was the first time she had ever complained to defendant about such troubles.

**SAME.** Upon an issue as to the sanity of the accused, after the admission of evidence as to statements made by defendant to his attorney just before the commission of the offense, which tended to show defendant's physical and mental condition, it is error to exclude evidence of what the attorney stated to the defendant.

**WITNESSES—IMPEACHMENT—CORROBORATION OF IMPEACHED WITNESS.** The defendant has a right to offer evidence in support of his answer to an impeaching question, after the state has impeached it.

**CRIMINAL LAW—TRIAL—ORDER OF PROOF.** It is error to refuse to allow the defendant to contradict substantive evidence offered by the state as impeaching evidence, but which should have been introduced as part of the state's case in chief.

Appeal from a judgment of the superior court for King county, Morris, J., entered April 20, 1907, upon conviction of the crime of assault with a deadly weapon with intent to do bodily harm, after a trial upon an information charging the crime of assault with intent to murder. Reversed.

*Morris, Southard & Shipley*, for appellant.

*Kenneth Mackintosh and John F. Miller*, for respondent.

**FULLERTON, J.**—William Constantine was informed against by the prosecuting attorney of King county for the crime of

assault with intent to murder, committed with a revolver on the person of one Jesse M. Hall. To the information he pleaded not guilty, and on the issue thus made was tried by a jury, which returned a verdict finding him "guilty of assault with a deadly weapon with intent to do bodily harm." On this verdict he was adjudged guilty by the court of the crime defined by Bal. Code, § 7058 (P. C. § 1575), and sentenced to a term of one year in the state penitentiary and to pay a fine of \$5,000. From the judgment and sentence he appeals.

The errors assigned are based wholly upon rulings of the court made in passing upon objections to the admission of evidence. These we will proceed to notice in their order.

When the complaining witness, Jesse M. Hall, was on the witness stand he was questioned on cross-examination concerning a civil action he had commenced against the appellant to recover damages for injuries suffered on account of the shooting. In the course of the inquiry the complaint itself was offered in evidence, and, on an objection made on the part of the state, was excluded by the court. This ruling constitutes the first error assigned. But we think the ruling correct. The fact that such a civil action had been begun was material on the question of the credibility of the witness, as it tended to show that he had more than the usual interest in the result of the criminal prosecution against the appellant, but all that was material was proven when the fact itself was admitted by the witness. It could add nothing to the proofs to introduce the complaint.

The witness Hall further testified, in answer to questions propounded to him by the state, that after the institution of the civil action and the commencement of the criminal prosecution, certain persons (referred to as the appellant's "emissaries" by the state's counsel) purporting to represent the appellant had approached him and offered to pay the hospital and medical fees he had incurred on account of his injuries, pay for a trip to California or some other place that

Jan. 1908]

Opinion Per FULLERTON, J.

he might designate, and give him "a bunch of money besides," if he would abandon further prosecution of the civil action and not appear as a witness against the appellant in the criminal proceeding. On cross-examination he was questioned further concerning these proposals, and stated that one of the persons who approached him was a certain doctor whom he named. As a part of his defense the appellant produced this doctor, and sought to question him concerning the transaction; asking him, among other things, if he had ever made such a proposition to Hall as had been testified to by Hall while on the witness stand. To this inquiry an objection was interposed and sustained. The appellant thereupon offered to prove by the witness that he had never at any time, either as the representative of the appellant or otherwise, made any such proposition to the witness Hall, as had been testified to by Hall. This offer, also, the court rejected. The rulings of the court rejecting this evidence is the second error assigned.

The state in its brief seeks to justify the exclusion of this evidence on two grounds; first, that the fact testified to by Hall was a collateral and immaterial matter in itself and could not be made the basis of contradictory evidence, since the rule is that a witness cannot be contradicted on testimony he may give that is foreign to the issue, even though he testified untruthfully in regard thereto; and, second, that the questions put to the doctor called for evidence tending to impeach Hall, and no proper ground was laid in the examination of Hall for impeaching him.

The first ground stated clearly mistakes the law. It is a rule of evidence, as old as the law itself, applicable alike to both civil and criminal causes, that a party's fraud in the preparation or presentation of his case, such as the suppression or attempt to suppress evidence by the bribery of witnesses or the spoliation of documents, can be shown against him as a circumstance tending to prove that his cause lacks honesty and truth. *Carpenter v. Willey*, 65 Vt. 168, 26 Atl.

488; *Chicago City R. Co. v. McMahon*, 103 Ill. 485, 42 Am. Rep. 29; *Houser v. Austin*, 2 Idaho 204, 10 Pac. 37; *Cruikshank v. Gordon*, 118 N. Y. 178, 23 N. E. 457; *Waterhouse v. Rock Island Alaska Min. Co.*, 38 C. C. A. 281, 97 Fed. 466; *Graves v. United States*, 150 U. S. 118, 14 Sup. Ct. 40, 37 L. Ed. 1021; *Rice v. Commonwealth*, 102 Pa. St. 408; *People v. Chin Hane*, 108 Cal. 597, 41 Pac. 697; *State v. Hogan*, 67 Conn. 581, 35 Atl. 508; *Keesier v. State*, 154 Ind. 242, 56 N. E. 232; *State v. Roxum*, 8 N. D. 548, 80 N. W. 477; *State v. Roller*, 30 Wash. 692, 71 Pac. 718.

In the last-cited case this court held that a letter of the defendant, who was under arrest for incest, addressed to his son requesting the son to persuade the prosecuting witness not to testify against him, was evidence corroborative of other evidence tending to show guilt. The rule that permits acts of this character to be shown in evidence has its foundation in human experience. This experience has demonstrated that men who have meritorious causes do not generally resort to bribery and spoilation to maintain them, but that such conduct is the resort of those who are conscious that the truth, if all is told, will not aid them. In this case this evidence was particularly persuasive. The defense attempted to be maintained was temporary insanity. Manifestly if the defense was entered upon in good faith, nothing the prosecuting witness could truthfully testify to would be more effective as evidence than the statements of other persons who had an opportunity to observe the defendant's conduct and his condition of mind. The inference is strong, therefore, that the desire to suppress his testimony, if such desire existed, arose from other feelings than consciousness of merit in the defense attempted. The testimony being material it was, of course, competent to contradict it.

It was proper also to contradict it in the manner the defense attempted to contradict it. The witness testified to a fact which tended to establish the substance of the issue. It

Jan. 1908]

Opinion Per FULLERTON, J.

was competent therefore for the opposing party to dispute the fact by evidence to the contrary. While the evidence did tend to impeach the prosecuting witness in a sense—that is, it tended to show that he had testified untruthfully—yet it was not that form of impeachment that requires any particular question to be put to him before the impeaching evidence can be introduced. That condition arises only where it is sought to impeach the witness by showing that he has made contradictory statements at some other time and place. In the latter case it is necessary before the impeaching evidence can be introduced, to call the witness' attention to the contradictory statements, the time when and place where they were made, the circumstances surrounding their making, and give him an opportunity to deny, admit or explain them. But where the witness testifies to a material matter as a fact, he can be impeached by merely showing that the matter testified to is untrue. It was prejudicial error, therefore, for the court to exclude this evidence.

Mr. Vince H. Fabin, called as a witness on behalf of the appellant, after testifying to the appellant's mental condition immediately following the shooting as he observed it, said that he accompanied the appellant's wife and daughter to the jail shortly after the appellant was arrested and placed therein. On cross-examination he was asked concerning the appellant's conduct when his wife and daughter came to him at the jail, and as to certain remarks the appellant made to his daughter at that time. On redirect examination he was asked to state what the daughter said to her father just preceding the statement which the father made and which he had repeated to the jury. To this question an objection was interposed and sustained by the court. This was a proper question and the witness should have been permitted to answer it. The matter under investigation was the condition of mind of the appellant at that time. The state sought to show that his mind was then rational by showing a particular state-

ment made by him to the daughter which tended to indicate rationality. The appellant was entitled therefore to place before the jury such part of the entire occurrence as would in any way tend to aid the jury in arriving at the true condition of mind of the appellant. The fact called for would have been of some aid. It would have shown at least whether it was responsive or otherwise to the daughter's statement, and thus indicated in some degree either rationality or irrationality. Since the appellant did not indicate in the record what he expected this evidence to show, this error would not require reversal if standing alone. It is discussed and determined because a new trial must be awarded and the same question will probably again recur.

In the examination of Mr. W. W. Wilshire, the following appears:

The Court: "Was he sane or insane? (Meaning the defendant.) The witness: "I am not an expert, I cannot say whether a man is sane or insane. His mind was disordered, I should say." Counsel for the state, "Objected to, and move that it be stricken " The court: "The objection will be sustained."

The answer should have been allowed to stand as part of the evidence for the consideration of the jury. A nonexpert witness may give his opinion as to the mental condition of a defendant, whose mental condition is the subject of inquiry, in his own language. He need not use the words "sane" or "insane" in describing that condition if he thinks some other form of words will more nearly express his ideas.

The prosecuting witness was the son-in-law of the appellant. He had married the appellant's daughter some six months before the shooting occurred. Immediately after their marriage the young couple took up their residence at Butte, Montana. The prosecuting witness did not succeed financially and the appellant brought the couple to his own home in Seattle, and started his son-in-law in business in that city. On Saturday evening preceding the Tuesday on which the shoot-

Jan. 1908]

Opinion Per FULLERTON, J.

ing occurred, the daughter came to the father's place of business in a very agitated condition of mind, and, in answer to her father's inquiries as to the cause of her agitation, made some complaint against her husband, declaring that she could no longer live with him. The father soothed her as best he could, and later on accompanied her home. On the next day, two days preceding the shooting, he went riding with her, and while so riding undertook to reconcile her to her husband. The daughter, apparently in justification of her conduct, related to him some of the acts of cruelty her husband had been guilty of towards her while they were residing in Butte, telling him also, when he expressed the belief that the difficulties she had recited could be overcome, that there were other things, which shame forbade her telling him, which made it impossible for her to live longer with her husband. It was this recital of his daughter, with some additional particulars which were related to him the next morning, that it is asserted unsettled his reason and caused him to make the assault complained of.

The appellant undertook to prove these facts by the daughter herself. While on the witness stand she testified to the occurrences and to the appellant's appearance and conduct during the time she related them to him. She was then asked by counsel if this was the first time she had ever made complaint to her father about the trouble existing between herself and her husband. To this question an objection was interposed and sustained. The court should have permitted the witness to answer. It would have aided the jury somewhat, we think, in determining whether the appellant's mind was unbalanced at the time he committed the act for which he was being tried, to know when he was first made acquainted with the fact that the prosecuting witness had been guilty of wrongs towards his daughter.

The appellant, on the morning of the shooting and preceding that event, went to the office of a Mr. Fabin, an attor-

ney, to consult with the attorney concerning the procurement of a divorce for his daughter. While on the witness stand, as a witness in his own behalf, he was allowed to state what he did and said while consulting with the attorney, but was not permitted to relate what the attorney said to him. There would seem to be no valid reason for this distinction. The evidence was admissible, if it was admissible at all, on the principle that it tended to show the then physical and mental condition of the appellant. Surely this purpose would have been accomplished much better by showing this entire transaction as it occurred, than by the halting effort made by the witness in his endeavor to segregate his part of the conversation from that of the person with whom he was conversing.

On cross-examination the appellant was asked the following question:

"Now Mr. Constantine, I will ask you this question, if on Tuesday morning the second day of October, at about from 8 to twenty minutes after 8 in the morning you did not come into your meat market and go to your bookkeeper and say to him, substantially, 'Can you run this business for a day or two if I am not here?' and he says, 'Yes, I think so,' and you said, 'I don't want you to think, I want to know if you can;' and he says, 'Yes.' You then gave your bookkeeper, Ira Williams, \$20.00 in gold coin and you told him, 'Go and get me an automatic pistol and I will kill that son-of-a-bitch,' and that took place in the presence of Henry Weber and you and Mr. Williams there in your place on that occasion?"

To the question he answered, "No, sir."

In rebuttal the state put a witness on the stand who testified that the occurrences recited in the question took place substantially as therein related. The appellant thereupon sought to show by the witnesses Hardy and Williams that nothing occurred at the time in question such as the question implied and the state's witness related. An objection was interposed and sustained to this offer of proof, to which the appellant excepted.

Jan. 1908]

Opinion Per FULLERTON, J.

The court seems to have sustained the objection on the theory that the question asked was an impeaching question, on which the appellant could offer no other evidence than his own statement, and that he could only admit or deny the accusation. But such is not the rule. Conceding that the question was an impeaching question and proper as such, the appellant had the right to offer evidence in support of his answer after the state had impeached it, and the court improperly sustained objections to the evidence offered even on that theory. But the question was not properly an impeaching question. The question called for substantive evidence tending directly to support the issue between the state and the appellant, and should have been introduced as a part of the state's case in chief, so that the defendant could have met it when presenting his side of the case. The evidence being therefore a part of the state's case in chief, it was error not to permit the appellant to contradict it.

For the errors noted the judgment appealed from is reversed, and a new trial granted.

HADLEY, C. J., CROW, and MOUNT, JJ., concur.

[No. 7006. Decided January 9, 1908.]

JOHN W. KERSHNER, *Respondent*, v. FITZHUGH HENDERSON,  
*Appellant*.<sup>1</sup>

MASTER AND SERVANT—RELATION—TERMINATION—NOTICE. A contract for employment for an indefinite time may be terminated by either party by notice to the other; and where a bill for service was presented through an attorney, notice of termination may be given by the other party through the same source, and there can be no recovery for services rendered thereafter.

Appeal from a judgment of the superior court for Kitsap county, Yakey, J., entered April 11, 1907, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on a contract of employment. Reversed.

*William C. Keith*, for appellant.

*W. A. McLeod* and *C. D. Sutton*, for respondent.

FULLERTON, J.—In this action the respondent sought to recover of the appellant the sum of \$1,250, alleged to be the reasonable value of certain services which he claims to have performed for the appellant at the appellant's special instance and request. The services consisted of waiting upon the appellant for a few days, and acting as caretaker for some two years of certain real estate which the appellant owned, situated in Kitsap county. The answer put in issue the allegations of the complaint, and a trial was had thereon resulting in a verdict and judgment in favor of the respondent for the sum of \$1,000.

The evidence tended to show that the appellant had a stroke of paralysis in the early part of August, 1903, while residing upon the real estate mentioned, and employed the respondent to attend upon him, evidently expecting to recover within a short time. A few days later he suffered from another stroke

<sup>1</sup>Reported in 93 Pac. 323.

Jan. 1908]

Opinion Per FULLERTON, J.

which left him in a practically helpless condition, whereupon a nephew came from some place in Virginia and took him to an asylum in that state for treatment, leaving the respondent in possession of his home upon the real estate. The respondent continued to reside on the property until some time the next spring, when he presented to a Mr. Keith, the appellant's counsel, certain demands or bills for services rendered in caring for the real property. These demands were forwarded to the appellant, who replied thereto by saying that the respondent was not in his employ, and directing him to quit and surrender up possession of the place.

There was testimony to the effect, although disputed by the respondent, that this notification and this letter was shown the respondent by Keith. The respondent, however, still continued to reside on the place and later on brought this action as before stated. On the trial of the cause the appellant requested the court to charge the jury to the effect that if they found that appellant did notify the respondent to quit and surrender the premises on receipt of his demand of payment as caretaker for the same, and that this notification was brought to the respondent's attention, that the respondent could not recover for any services performed as caretaker of the premises after that time. This instruction was refused, and constitutes one of the principal errors assigned.

The instruction should have been given. The contract of employment, if any existed at all, was a contract for an indefinite time, and could be terminated by either party whenever that party so desired by giving notice to the other. The repudiation by the appellant of the respondent's claim of employment, and the notification given by him to the respondent to quit the premises, was a sufficient notice to terminate the contract, conceding that one existed, whenever it was brought to the respondent's attention. No formal service of the notice was required. By presenting his demand for payment to the appellant through Keith, the respondent authorized the ap-

pellant to reply through the same source, and if he did reply to the effect that the contract was at an end, and this reply was shown the respondent, it was sufficient notice to terminate the contract relation. The respondent's possession of the premises was wrongful from that time on, and he cannot recover for any services performed thereafter as caretaker.

The appellant stoutly maintains that the respondent's possession was wrongful from the beginning, and that he cannot recover for any services as caretaker of the premises. But on this question we think there is a substantial dispute in the evidence, and that the question was one for the jury. The other errors assigned merit no special consideration.

For the error noted the judgment is reversed and a new trial is awarded.

HADLEY, C. J., MOUNT, and CROW, JJ., concur.

DUNBAR and ROOT, JJ., took no part.

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[No. 6804. Decided January 15, 1908.]

THE STATE OF WASHINGTON, *on the Relation of the Espy Estate Company, Appellant*, v. BOARD OF COMMISSIONERS OF PACIFIC COUNTY,  
*Respondent.*<sup>1</sup>

DRAINS—ASSESSMENTS—AMOUNT—BENEFITS TO PROPERTY—MANDAMUS. In proceedings to assess property for benefits accruing by reason of the construction of a drainage district, the county commissioners have no power to assess property in excess of the benefits received; and in the absence of fraud, they cannot be compelled by mandamus to increase their assessment for benefits so as to cover the total cost of the work and interest.

SAME—PROCEEDINGS UNDER CURATIVE ACT—LEVY OF ASSESSMENT—EFFECT OF FORMER VOID PROCEEDINGS. Where the proceedings for the assessment of property for a drainage district were void, and the legislature, recognizing the moral obligation of the lands benefited,

<sup>1</sup>Reported in 93 Pac. 326.

Jan. 1908]

Opinion Per FULLERTON, J.

provided a method for making the cost a lien thereon, the county commissioners in making a new assessment are not bound by the acts of the former board, but must determine the amount of benefits to be assessed.

Appeal from a judgment of the superior court for Pacific county, Rice, J., entered November 1, 1906, in favor of the defendant, upon sustaining a demurrer to the affidavit, dismissing proceedings against the commissioners of a county for contempt in the assessment of benefits to land benefited by the construction of a drainage ditch. Affirmed.

*Sol. Smith*, for appellant.

*J. J. Brumbach* (*H. W. B. Hewen*, of counsel), for respondent.

FULLERTON, J.—This is a continuation of the controversy a statement of which is found in the case of *Espy Estate Co. v. Pacific County*, 40 Wash. 67, 82 Pac. 129. After the remittitur went down in that case, the trial court issued a writ of mandamus to the board of county commissioners of Pacific county requiring them to create a fund, pursuant to the provisions of the statute of 1895, for the payment of the indebtedness incurred as set forth in the application for the writ. The board proceeded as directed, and on the hearing found that the lots and parcels of lands subject to assessment were not benefited in an amount equal to the sum now outstanding in principal and interest incurred in the construction of the ditch; but found that the utmost such lands were benefited was an amount equal to the principal of such indebtedness, and for this sum they caused an assessment to be made. The appellants conceived this to be in disobedience of the mandatory order, and instituted this proceeding to punish the commissioners for contempt. A demurrer was interposed and sustained to the affidavit asking for a writ to show cause, and, on the appellants electing to stand thereon, a judgment of dismissal was entered. This appeal was taken therefrom.

The appellant in its affidavit asking for the writ does not in anywise impugn the motives of the commissioners. It is not charged that they fraudulently or corruptly made the finding that the lands subject to assessment were not benefited to an amount equal to the outstanding obligations, or that the lands were in fact benefited in a greater sum than the commissioners levied thereon. The affidavit is silent on these questions. It must be presumed therefore that the commissioners performed their full duty, and assessed the lands to the full amount of the benefits conferred upon them by the improvement.

These considerations conclude the case against the appellant. Both by the statute under which the commissioners acted and by the fundamental law, the commissioners were without power to assess against the land a greater sum than the amount of the benefits the improvement conferred upon them. This was so held by this court in *State ex rel. Latimer v. Henry*, 28 Wash. 38, 68 Pac. 368. In that case we said:

"Costs to be assessed for local improvements cannot exceed the benefits conferred. Section 3 of the act of 1895, in effect, so provides. It requires the county commissioners to ascertain the aggregate cost of the ditch and apportion the same to each lot, tract of land, etc., according to benefits resulting from the improvements, *not exceeding the amount of said benefits*. Under this provision the cost may be less or equal to the benefits. For all portions of the cost exceeding the benefits, no assessment can be made on the property benefited."

See, also, *McNamee v. Tacoma*, 24 Wash. 591, 64 Pac. 791; *Elma v. Carney*, 9 Wash. 466, 37 Pac. 707; *New Whatcom v. Bellingham Bay Imp. Co.*, 9 Wash. 639, 38 Pac. 163; *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443. Since therefore they levied to the full extent of their powers, they cannot be punished for a failure to levy more.

The contention to the effect that the present board of county commissioners in making the assessment are bound by

Jan. 1908]

Syllabus.

the acts of the former board had under the void statute of 1890 is not well taken. Inasmuch as the work performed in pursuance of that statute benefited certain real property affected by it, it was proper for the legislature to recognize the moral obligation to pay the costs of the improvement, and provide a method by which that moral obligation could be turned into a legal one and made a lien on the property benefited up to the amount of the benefits. But the legislature was without power to make, and it did not attempt to make, the original assessment a lien on the property, without further proceedings. As the act of 1890 was void, the proceedings had under it were void, and new notices to the owners of the property and an opportunity to be heard were necessary before the costs of the improvement could be made a fixed lien. The question of the amount of the benefits conferred, therefore, was for the present board to determine, and they did not exceed their powers when they undertook to, and did, determine it.

The judgment is affirmed.

HADLEY, C. J., CROW, MOUNT, and RUDKIN, JJ., concur.

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[No. 6825. Decided January 15, 1908.]

INEZ WALTERS, *a Minor, by Her Guardian Ad Litem, Leona Walters, Respondent*, v. SEATTLE, RENTON & SOUTHERN RAILWAY COMPANY,  
*Appellant*.<sup>1</sup>

CARRIERS—INJURY TO PASSENGERS—OBSTRUCTION ON TRACK—DEGREE OF CARE—INSTRUCTIONS. In an action for personal injuries sustained in a street car collision, it is proper to refuse an instruction exonerating the defendant from liability in case the motorman's failure to avoid the collision, with the exercise of the highest degree of care, was due to some clay deposited on the track by "some agency not under the control of the defendant," where the instruction

<sup>1</sup>Reported in 93 Pac. 419.

omitted the qualification that the defendant must have exercised the highest degree of skill and care to have discovered and removed the obstruction.

**SAME—COLLISION OF STREET CARS—PRESUMPTIONS—PLEADING AND PROOF—SPECIFIC ALLEGATIONS.** The fact that the plaintiff was unable to prove the particular cause of a collision of street cars, as set forth in her complaint, does not deprive her of the benefit of the presumption that negligence is presumed from the happening of a collision, since that was alone the substance of the issue, and the particular cause alleged need not be proved.

**WITNESSES—CROSS-EXAMINATION—CREDIBILITY—DEGRADING WITNESS.** Upon the cross-examination of a witness who had testified as to the proper manner of stopping a street car on a grade, a question as to certain charges preferred against him, upon which he was dismissed from the defendant's employ, relates to a collateral matter which does not affect his credibility as to the fact testified to, and he may properly decline to answer; since the only purpose of the question was to expose him to disgrace.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered February 21, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a passenger in a street car collision. Affirmed.

*Sachs & Hale*, for appellant.

*Jackson Silbaugh*, for respondent.

**FULLERTON, J.**—The appellant owns and operates an electric railway extending from the city of Seattle to the town of Renton, in King county. On August 13, 1906, the respondent was a passenger on one of the appellant's cars, and was injured by a collision which occurred between the car on which she was riding and a car coming from the opposite direction. This action was brought to recover damages for the injuries received. At the trial the jury returned a verdict in favor of respondent for the sum of \$5,000. The trial judge deemed the recovery excessive, and reduced it to \$3,000, offering the respondent the alternative of accepting it as reduced

Jan. 1908]

Opinion Per FULLERTON, J.

or submitting to a new trial. The respondent accepted the modified verdict, and the judgment from which this appeal is taken was entered thereon.

The appellant requested an instruction to the effect that if the car which collided with the car on which the respondent was riding came in contact with some clay which had been deposited upon the track "by some agency not under the control of the defendant," and that when the car wheels struck such clay the car, by reason of coming in contact therewith, shot forward, and that the motorman thereon did all in his power to stop the car before it came into collision with the car on which the appellant was a passenger, but could not with the highest degree of care have prevented the collision, and the motorman on the other car was guilty of no negligence, then the appellant would not be liable for the collision or liable in damages to the respondent for her injuries. This instruction the court properly refused. It does not correctly measure the appellant's duties. For a railway company carrying passengers to show merely that a collision was caused by some obstruction of the track, caused by an agency over which it had no control, is not enough to excuse it from responsibility for a collision. It must go further and show that it could not by the highest degree of care and diligence consistent with the practical operation of its railway have discovered and removed the obstruction prior to the time it operated its cars over the track. The instruction requested omitted this qualification and was therefore incorrect as a statement of the law.

The court charged the jury in substance that the happening of the collision raised a presumption of negligence on the part of the railway company, and that the respondent was entitled to recover thereon unless they were convinced that the evidence on the part of the railway company overcame this presumption. The appellant admits the correctness of the rule as applied in this jurisdiction, but contends that there was here no room for its application, as the respondent did

not content herself with alleging generally that she was a passenger on the car, that a collision occurred, and that she was injured thereby, but went further and alleged particularly the cause of the accident, and that since she alleged the cause of the accident she must prove it as alleged or subject herself to a nonsuit.

This contention is not tenable. The plaintiff was not deprived of the case proved by a failure to prove all that was alleged. She was only obligated to prove the substance of the issue, and by the substance of the issue is meant the facts essential to a recovery. "The rule is, that whatever cannot be stricken out without getting rid of a part essential to a cause of action must be retained, and, of course, proved even if it be described with unnecessary particularity." In this case all that pertained to the particular cause of the accident could have been stricken out and still enough remain to warrant a recovery. The particular cause of the accident was not, therefore, of the substance of the issue, and it was not necessary for the appellant to prove it in order to recover, even though it was alleged. Doubtless, in many cases, it is desirable to plead and prove the exact cause of an accident in order that the question of the defendant's negligence may be put beyond the peradventure of a doubt and thus insure a recovery, where otherwise recovery might be doubtful if the presumption alone were relied upon. Such was perhaps the purpose of the plaintiff in this instance. But the plaintiff is not to be deprived of the case her pleadings and proofs made merely because she alleged a stronger case than she was able to prove. *Cassady v. Old Colony St. R. Co.*, 184 Mass. 156, 68 N. E. 10; *Chicago City R. Co. v. Carroll*, 206 Ill. 318, 68 N. E. 1087; *North Chicago St. R. Co. v. Cotton*, 140 Ill. 486, 29 N. E. 899; *Wood v. Roxborough etc. Pass. N. Co.*, 12 Montg. Co. Rep. (Pa.) 155.

A Mr. Johnson, who had formerly been a motorman in the employ of the Seattle Electric Company, was called as a wit-

Jan. 1908]

Opinion Per FULLERTON, J.

ness on the part of respondent and testified as to the proper method of stopping a car when on a grade such as the one on which the accident in question happened. On cross-examination he testified that he had been on the police force of the city of Seattle since he quit work for the Seattle Electric Company, but was dismissed therefrom because of certain charges which were preferred against him. He was asked what the charges were, and declined to answer. The question was repeated, when an objection was interposed which the court sustained. It is claimed that this was error, but we think the ruling proper. The witness was being questioned on a collateral matter which could affect only his credibility generally; not his credibility as a witness to the particular fact under consideration or as a witness in the particular case. When such is the fact, a witness may decline to answer questions whose only purpose is to degrade him, or expose him to disgrace or infamy. That such was the purpose of this question cannot, of course, be gainsaid.

It is finally insisted that the amount of recovery is excessive notwithstanding the reduction made by the trial judge. But we have examined the evidence on this question and see no sufficient reason for a further reduction.

The judgment is affirmed.

HADLEY, C. J., CROW, RUDKIN, and DUNBAR, JJ., concur.  
MOUNT and ROOT, JJ., took no part.

[No. 6890. Decided January 15, 1908.]

W. S. LOBB *et al.*, *Respondents*, v. SEATTLE, RENTON &  
SOUTHERN RAILWAY COMPANY, *Appellant*.<sup>1</sup>

PLEADING—AMENDMENT—TO CONFORM TO PROOF—DAMAGES. In an action for personal injuries, in which the complaint alleges certain items of special damages, and prays for a sum in excess thereof, it is proper to allow a trial amendment alleging general damages in a sum equal to the difference between the special damages and the sum prayed for, where proof of general damages was admitted without objection, and the defendant did not move for a continuance on making its claim of surprise.

SAME—COLLISION OF STREET CARS—PRESUMPTIONS—PLEADING AND PROOF—SPECIFIC ALLEGATIONS. The fact that the plaintiff was unable to prove the particular cause of a collision of street cars, as set forth in her complaint, does not deprive her of the benefit of the presumption that negligence is presumed from the happening of a collision, since that was alone the substance of the issue, and the particular cause alleged need not be proved.

Appeal from a judgment of the superior court for King county, Griffin, J., entered April 9, 1907, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained by a passenger through the derailment of a street car. Affirmed.

*Sachs & Hale*, for appellant.

*Aust & Terhune*, for respondents.

FULLERTON, J.—The appellant owns and operates an electric railway between the city of Seattle and the town of Renton, in King county. On November 2, 1906, the respondent Annie Lobb took passage on one of the appellant's cars at Renton, intending to ride to the city of Seattle. On the way the car for some cause left the track and turned partially over, throwing the respondent with considerable violence across the car, causing injuries for which she sued in this action.

<sup>1</sup>Reported in 93 Pac. 420.

Jan. 1908]

Opinion Per FULLERTON, J.

The jury returned a verdict in her favor, and from the judgment entered thereon the railway company appeals.

It is first assigned that the court erred in allowing the respondents to amend their complaint at the close of the evidence after each side had rested. In their complaint the respondents alleged both general and special damages. The claims for special damages were itemized and the amount of each item specially stated. There was no designated amount claimed as general damages, other than that the demand for relief stated a sum considerably in excess of the total set out in the complaint as special damages. The amendment sought and allowed was to add to that paragraph of the complaint describing the injuries received and their effect the words, "and plaintiffs have been damaged thereby in the sum of \$1,547.75;" a sum which, when taken with the special damages alleged, equaled the amount demanded in the complaint. When the amendment was tendered the appellant objected, and, on its objection being overruled, it claimed to be surprised by the amendment, and stated that it was not prepared at that time to meet it with further evidence, but did not move for a continuance or time to produce further evidence.

It is urged here that the prayer of the complaint is no part of the allegations of fact, and that all the appellant was entitled to recover under the complaint as it stood prior to the amendment was the amount of the special damages alleged, and that it was error on the part of the court to allow at that stage of the proceeding an amendment which would so materially increase the amount of permissible recovery. But we think this contention not well taken, even if it be assumed that the complaint as it originally stood only permitted a recovery of special damages. There was no objection interposed when the respondents offered evidence to sustain their claim of general damages, and as far as the record discloses the case would not have been tried differently had this clause put in by the amendment been in the original com-

plaint; or, to state the fact in another way, the cause was tried as if upon sufficient pleadings. Where such is the case, amendments may be allowed to the pleadings at any stage of the proceedings, and even this court in such cases, where no amendments have been offered or made, is obligated by statute to treat all amendments which could have been made as made, and try the cause upon its merits. Bal. Code, § 6535 (P. C. § 1083).

The case of *Howells v. North American Transp. & Trad. Co.*, 24 Wash. 689, 64 Pac. 786, is not in point here. In that case the court instructed the jury that the plaintiff could recover for a specific item, although no damages were claimed on account thereof in the bill of particulars furnished the defendant by the plaintiff on the defendant's demand. That is not the case before us. Here general damages for the injury were at all times claimed, both in the complaint and on the hearing, the defect being that the complaint did not specify the particular amount demanded. The amendment was properly made, and the appellant suffered no prejudice thereby.

The question whether the respondent waived her right to rely on the presumption of negligence arising from the fact that the car was derailed, by pleading and undertaking to prove the specific cause of the accident, is discussed and decided contrary to the appellant's contention in *Walters v. Seattle, Renton & Southern R. Co.*, ante p. 233, 93 Pac. 419. We find no merit in the claim that the evidence does not justify the amount of the recovery.

The judgment is affirmed.

HADLEY, C. J., CROW, MOUNT, RUDKIN, and DUNBAR, JJ.,  
concur.

ROOT, J., took no part.

Jan. 1908]

Syllabus.

[No. 8904. Decided January 15, 1908.]

ANDREW BARCLAY, *Respondent*, v. PUGET SOUND LUMBER  
COMPANY, *Appellant*.<sup>1</sup>

MASTER AND SERVANT—RELATION—INDEPENDENT CONTRACTOR. The relation of an independent contractor is not created by a contract whereby one agrees to employ the help and operate a lath mill and to receive as compensation a certain sum per thousand lath, after the owner has paid the employees therefrom, the owner having retained control of that department of the mill and the mode of work, and control over the workmen employed.

SAME—NEGLIGENCE—ACTIONS FOR INJURIES—GUARDING MACHINERY—QUESTION FOR JURY. The question as to whether machinery can be advantageously guarded under the factory act is for the jury where that was the principal issue in the case and the testimony is conflicting.

SAME—EVIDENCE—ADMISSIBILITY. Upon an issue as to whether machinery can be advantageously guarded, evidence that a certain contrivance could have been attached as a guard is not objectionable because the same was not in general use or commonly known, the question whether reasonable care was exercised in providing a guard being for the jury in such a case.

SAME. In an action for personal injuries received on a trimmer saw through the alleged failure to provide a guard, evidence as to the necessary size of the saw is immaterial, there being no issue on that question.

SAME—TRIAL—INSTRUCTIONS. An instruction upon the necessity of guarding machinery under the factory act, stating the law too broadly when considered alone, is not ground for reversal, where, considered in the connection in which it was used, it was limited by other instructions in a way that could not have misled the jury.

TRIAL—MISCONDUCT OF COUNSEL—ARGUMENT. Argument of counsel going beyond legitimate limits is not ground for reversal where the trial judge rebuked counsel and removed any prejudice the jury may have received.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$5,000, for the loss of two front fingers of the right hand is excessive, and should be reduced to \$2,500.

<sup>1</sup>Reported in 93 Pac. 430.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered January 15, 1907, upon the verdict of a jury for \$5,000 damages, for personal injuries sustained by an employee in a lath mill. Affirmed on condition of remitting \$2,500.

*F. D. Oakley*, for appellant.

*Govnor Teats*, for respondent.

FULLERTON, J.—The respondent while employed in the appellant's mill cut his hand on one of the saws of a lath trimmer on which he was working, and brought this action to recover damages therefor. He based his cause of action on the contention that the saw on which he was injured was not guarded as required by the factory act. On the trial the jury returned a verdict in his favor, assessing his damages in the sum of \$5,000. From the judgment entered on the verdict this appeal is taken.

The first assignment is that the court erred in overruling the demurrer to the complaint. The third and fourth paragraphs of the complaint were as follows:

"III. That on the 6th day of February, 1906, the said defendant was operating the said lath mill by and through a certain contract made by said defendant with one Robert S. Tillman, at \$.75 per thousand lath produced, wherein the said Robert S. Tillman, was to employ the other men at work in said lath mill and the said defendant was to pay the said employees so employed by the said Tillman out of the said \$.75 per thousand, any and all wages due them in the operation of the said lath mill, and the said Tillman, in consideration of his employment, was to receive the balance and residue, if any, computing at the rate of \$.75 per thousand lath produced.

"IV. That on the 6th day of February, 1906, the plaintiff herein was employed to work in defendant's said lath mill by the said Robert S. Tillman, under and by virtue of said Tillman's contract with the said defendant as herein set out, and while at work in the said defendant's lath mill on said 6th

Jan. 1908]

Opinion Per FULLERTON, J.

day of February, 1906, in the operation of the same, pulling, tying and trimming the lath at the trimmer saw, . . . etc., he was injured."

It is the appellant's claim that the facts alleged show Tillman to have been an independent contractor conducting an independent enterprise; that the relation of master and servant existed between the respondent and Tillman and not between the respondent and the appellant, and that in consequence the duty to guard the machinery devolved upon Tillman, the immediate employer, and was not a duty imposed upon it as between itself and Tillman's employer. But we cannot concede that this result follows from the facts pleaded. Tillman's relation to the appellant was rather that of an agent than that of an independent contractor. The appellant did not lease or surrender to him the management or control of this department of its mill; it surrendered only the right to employ the persons needed to carry on the work. It still retained control as to the manner and mode of doing the work, and control over the workmen employed by Tillman. This, as we say, did not make Tillman an independent contractor. He was but the agent of the appellant, acting in this regard for and on its behalf.

Under a similar state of facts, the court in *Nyback v. Champagne Lumber Co.*, 48 C. C. A. 632, 109 Fed. 732, used the following language:

"The defendant here was engaged in the general operation of its own mill. Owning the mill and machinery, it had possession, and, in a general sense, control, of all operations and work carried on. The slasher belonged to the defendant, and its sole use was to cut slabs and other like material belonging to the defendant into proper lengths for shingles, lath, and pickets, which, when cut, should belong to the defendant. The burden of keeping that machine in running order, the expense of oiling and repairing, remained with the defendant; the power to run it and the light to light it the defendant furnished; but it contracted with Barber to do the manual work necessary to operate the machine in cutting the material

so furnished, giving him no authority to use it upon other material of his own, or for anybody other than the defendant; and for the doing of this manual work upon the defendant's machine and material, as directed by the defendant, the defendant agreed to pay him a price measured by the product. While nominally Barber was to employ and pay for such assistance as he needed, the wages of the helpers were paid by the defendant, and deducted from the amount which otherwise should have been due to Barber. Without undertaking to lay down lines for the decision of other cases, we have no hesitation in saying that, upon the facts stated, and as they appear in this record, Barber was not an independent contractor, but a servant of the defendant, put in charge of a particular machine upon the terms stated, to operate it for the defendant, and that whatever duty there was to notify an inexperienced person engaged to work upon or about it of the dangers incident to the employment remained a duty of the defendant."

See, also, *Ziebell v. Eclipse Lumber Co.*, 33 Wash. 591, 74 Pac. 680; *Johnson v. Spear*, 76 Mich. 139, 42 N. W. 1092.

The appellant next argues that the evidence was insufficient to justify a finding on the part of the jury that the saw was not properly guarded, or could have been guarded in such a manner as to protect against injuries such as the respondent suffered and not seriously interfere with its practical operation. On these questions there was a substantial conflict in the evidence. Indeed, the record shows that these were the principal questions of fact in dispute in the court below, and that the greater number of witnesses called on each side were called to establish or disprove one or the other of these propositions. Under these circumstances, the questions were for the jury. As was said by us in *Rector v. Bryant Lumber etc. Co.*, 41 Wash. 556, 84 Pac. 7:

"Doubtless many cases will arise in which the court can say, as a matter of law, from the location of the machinery and the uses to which it is applied, that it can or cannot be advantageously guarded; but between these extremes there will necessarily arise a large class of cases where the question will

Jan. 1908]

Opinion Per FULLERTON, J.

be solely one of fact. The statute does not attempt to specify the particular machinery that shall be guarded, but declares that all machinery of a certain class shall be provided with proper safeguards where this can be done advantageously. If there is a conflict in the testimony as to whether a particular machine can or cannot be advantageously guarded, the question must be submitted to the jury under proper instructions. Under our system of jurisprudence there is no other way to determine the fact."

See, also, *Erickson v. McNeeley Co.*, 41 Wash. 509, 84 Pac. 3; *Boyle v. Anderson & Middleton Lumber Co.*, 46 Wash. 431, 90 Pac. 433; *Noren v. Larson Lumber Co.*, 46 Wash. 241, 89 Pac. 563.

Certain witnesses called on the part of the respondent testified that the saw could have been effectively and practically guarded against dangers similar to those causing the injury to the respondent by the use of an attachment to the contrivance on which the bundles of laths were laid before being pushed into the saws, called by them a "third leg." The appellant moved the court to take from the jury all evidence relating to this attachment, on the ground that it was visionary and impracticable and not in use in mills generally, and one not commonly known to millmen. This motion was properly denied. On the question of the practicability of the contrivance, there was a difference of opinion among the witnesses, and this being so, the jury were the proper judges of that question. It was no objection to its introduction as evidence that it was not in use in mills generally, or generally known to millmen. This plea, if allowed, would defeat the purposes of the factory act. That act was passed because owners and operators of dangerous machinery did not generally guard such machinery against possible injuries to their employees, and if the act requires the use of such guards only as were in general use at the time of its passage or generally known to millmen at that time, its effectiveness is destroyed. Being intended to compel the guarding of dangerous machinery,

owners and operators of such machinery, if they wish to avoid liability for accidents to their employees, must exercise reasonable prudence and care in guarding it. They must adopt such guards as reasonable prudence, observation, and care would suggest, regardless of the question whether other owners or operators of other mills have taken action on like machinery or not. And this being their duty, whether they have exercised that due care is ordinarily a question for the jury. They are not to be holden because they may not have foreseen some ingenious contrivance that makes an effective guard, but they must not stand back and await the suggestion of remedies when the exercise of reasonable prudence and care on their part will suggest them. This third leg, it seems to us, is not so far out of the ordinary that the court could say, as a matter of law, that it could not have been foreseen by the appellants had they exercised the care required of them, and this being so, the court very properly submitted the question to the jury.

A witness called on behalf of the appellant, in answer to questions put to him by appellant's counsel, testified that it was necessary to use a thirty-two inch saw on the lath trimmer (the machine on which the respondent was injured) because a saw lesser in size would not trim all the lathes in an ordinary bundle. He was then asked if the appellant had tried a twenty-eight inch saw and found it too small. To this question an objection was interposed and sustained by the court, on the ground that the inquiry was immaterial. The ruling is assigned as error, but we think the court was right in holding the inquiry immaterial. There was no issue on this point. It was not contended that the appellant negligently used saws on the trimmer larger than the necessities of the business required, nor was it contended that smaller saws would have been more safe than the ones in use. This being true, the question sought to introduce immaterial matter, and was properly rejected.

Jan. 1908]

Opinion Per FULLERTON, J.

The appellant complains of certain portions of the court's instructions to the jury. Separated from their connection with other instructions given, and considered as abstract propositions of law, doubtless some of them would be objectionable, because stating the rule too broadly. But considering them in the connection in which they are used, they were sufficiently limited in their application, and limited in a way that could not possibly have misled the jury. For example, a portion of the charge is quoted and urged as error because the court in that part of the charge did not mention the fact that practicability to guard a saw is a factor in determining whether a saw is or is not properly guarded, yet the court on this question charged the jury as follows:

"(1) The laws of the state of Washington, in force at the time of the accident to the plaintiff, provide that any person, firm or corporation, operating a mill where machinery is used, shall provide and maintain in use, reasonable safeguards for all saws which it is practicable to guard, and which can be effectively guarded with due regard to the ordinary use of such machinery and appliances and the danger to employees therefrom, and with which employees of any such mill are liable to come in contact while in the performance of their duties. Under this law, you are instructed that if you find that the trimmer saw or saws, upon which the plaintiff claims to have been injured, were unguarded and unprotected, and that it was practicable to guard the same effectively, having due regard for the use of the same, and if you find that it was not guarded, then you are to find the defendant negligent in that regard.

"(2) If, on the other hand, you should find that the saw was guarded, or that it was not practicable to guard it and it could not be guarded and used, then you should find that the defendant was not negligent in failing to guard the saw. There is a question of practicability as well as of fact that the saw was actually guarded. If it could not be guarded and used, the law would not require it to be guarded.

"(3) You are instructed that the only questions for you to decide as to the negligence of the defendant, if any, are: First, whether or not the trimmer saw upon which the plain-

tiff was injured, was guarded. Second: Whether or not it was practicable to guard the said trimmer saw in question. And, third: Whether or not the trimmer saw in question could have been guarded effectively, with due regard to the ordinary use of the same, and the dangers to the plaintiff therefrom, and with which the plaintiff was liable to come in contact while in the performance of his duties as operator of said trimmer saw.

"(4) You are instructed that if you find from the evidence that the said trimmer saw or saws, or either of them, upon which the plaintiff was injured, were not guarded and protected, but could have been guarded and protected as you have been instructed, and that the plaintiff was injured by reason of the same being unguarded and unprotected, and not by his own negligence, then you are to find the verdict for the plaintiff."

It is difficult to understand how the court could have been more explicit on this point. The appellant next complains of the language of respondent's counsel used in his argument to the jury. Counsel, unquestionably did go beyond the limits of legitimate argument, but the trial judge rebuked him for it, and we think removed any prejudice or wrong impression the jury may have imbibed from the argument.

The respondent suffered the loss of the two front fingers on his right hand. The verdict was for \$5,000. This we think so far excessive as to lead to the conclusion that it was given under the influence of prejudice. A verdict for one-half that sum we think will fully compensate for the injuries suffered.

The cause will be remanded to the superior court, with instructions to allow the respondent thirty days after notice to him that the remittitur has reached that court in which to remit from the amount of the judgment \$2,500. If the remission be made, the judgment will stand affirmed for the remainder, but if not made, the lower court will award a new trial.

HADLEY, C. J., MOUNT, CROW, DUNBAR, and RUDKIN, J.J., concur.

Jan. 1908]

Opinion Per FULLERTON, J.

[No. 6966. Decided January 15, 1908.]

LEVIN CARLSON *et al.*, *Appellants*, v. J. C. CURREN *et al.*,  
*Respondents*.<sup>1</sup>

APPEAL—NOTICE—SUFFICIENCY. An oral notice of appeal, given in open court at the time of signing judgment of dismissal, is sufficient; and the claim of insufficiency on the ground that the adverse party was not present cannot be first made on appeal where the judgment was regular on its face.

QUIETING TITLE—ACTIONS—JOINDER. In an action to quiet an equitable title, there is no misjoinder of equitable and legal causes of action by reason of the fact that plaintiff was in possession of part of the land, and out of possession of other portions; since an equitable suit to establish equitable rights by one out of possession is the proper form of action, without resorting to ejectment.

QUIETING TITLE—PARTIES DEFENDANT—JOINDER. There is no misjoinder of parties defendant in an action to quiet title to a single estate by reason of the fact that the defendants are severally in possession and claim adversely separate portions of the estate.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered April 15, 1907, upon sustaining a demurrer to the complaint, dismissing an action to quiet title and to recover possession of real property. Reversed.

*Boyle & Warburton*, for appellants.

*T. W. Hammond* and *J. W. A. Nichols*, for respondents.

FULLERTON, J.—The appellants purchased certain lots situated in the city of Tacoma which were sold by the county of Pierce under a judgment entered in a tax foreclosure proceeding, receiving a deed for the property in due course. At the time of the sale the respondents, J. C. and Mary Curren, were in possession of a part of one of the lots, claiming to hold as tenants of some third person. After the delivery of the tax deed, the appellants entered into possession of all that

<sup>1</sup>Reported in 93 Pac. 315.

portion of the lots not in possession of Curren and wife, whereupon Curren laid claim to the whole of the premises adversely to the appellants. The other respondents also laid claim to interests in the property adversely to the appellants. The appellants thereupon brought this action to quiet their title against the claims of all of the appellants, and to recover that portion of the lots in possession of the respondents Curren.

In their complaint the appellants set up the nature of their estate, alleging that they were owners in fee simple of the premises by virtue of the tax foreclosure proceedings and the sale thereunder and the deed executed in pursuance thereof; that the respondents Curren were in possession of a part of the premises and claimed the whole of the same adversely to the appellants; that the other respondents also claimed some interests in the premises adversely to the appellants, but that the claim of each and all of the respondents was without right, as neither of them had any right, title, or interest therein whatsoever. The prayer of the complaint was that the appellants be adjudged to be the owners in fee simple of the premises, and their title quieted against the claims of each and all of the defendants, and that they recover possession of the whole of the premises and the respondents Curren be ejected therefrom.

A demurrer was interposed to the complaint upon the statutory grounds: (1) That several causes of action had been improperly united; and (2) that the complaint did not state facts sufficient to constitute a cause of action. The demurrer came on for hearing before the superior court on March 2, 1907, and was, after argument, sustained. On April 15 thereafter, the appellants gave notice that they elected to stand on their complaint, and declined to amend, whereupon the court entered judgment dismissing the action. From the judgment so entered this appeal is taken.

The appellants move to dismiss the appeal for the reason that no sufficient notice of appeal was given. The notice of

Jan. 1908]

Opinion Per FULLERTON, J.

appeal was given in open court at the time the court signed the judgment of dismissal, and was regularly entered by the clerk on the journal of the court under the direction of the judge. This was in strict compliance with the statute and sufficient notice to perfect the appeal. We have not overlooked the contention of the respondents, made in their briefs, to the effect that the judgment was entered in their absence and without their knowledge, but this fact does not appear on the face of the record. On the contrary the judgment on its face is regular, and if it fails to recite the facts truly, the remedy must be found in some other proceeding than a motion to dismiss the appeal. The motion is denied.

The trial judge sustained the demurrer to the complaint on the ground that several causes of action had been improperly united. He seems to have taken the view that, since the respondents Curren were in possession of a part of the land, a different form of action was required to determine their rights than was required to determine the rights of the other adverse claimants, all of whom were out of possession; that the remedy against the first was ejectment to recover the possession, while an equitable action to quiet title was the remedy against those out of possession. This view of the remedies afforded a claimant in the situation that these plaintiffs found themselves unquestionably finds support in the decisions of this court as they stood at the time the judgment appealed from in this action was rendered. In the early case of *Spithill v. Jones*, 3 Wash. 290, 28 Pac. 531, and many subsequent cases, notably *Reichenbach v. Washington Short Line R. Co.*, 10 Wash. 357, 38 Pac. 1126; *Krutz v. Isaacs*, 25 Wash. 566, 66 Pac. 141, and *Povah v. Lee*, 29 Wash. 108, 69 Pac. 639, we held that the remedy against one in possession of land was ejectment, since any other remedy would deprive the party in possession to his right of trial by jury. But these cases were overruled on that point in the recent case of *Brown v. Baldwin*, 46 Wash. 106, 89 Pac.

483. In the last-cited case we held that one out of possession claiming land by an equitable title could maintain an action to quiet title against one in possession, and that in such an action full and adequate relief will be granted even to the extent of awarding possession, if such an award be necessary. It was not, of course, there decided that all actions to recover real property were actions of equitable cognizance and triable as such—on the contrary actions to recover real property which present purely legal controversies are still triable as actions at law—but it was decided that where the claimant's rights were of an equitable nature, he need not resort to the fiction of ejectment and have his case presented to a jury merely because the defendant was in possession of the property. There is therefore no objection to the form of the remedy sought by the appellants.

Nor is the complaint demurrable on the ground of misjoinder of defendants. In actions of ejectment at common law the plaintiff was not bound to bring separate actions against separate trespassers who had intruded upon his single, separate estate. As to him they were all wrongdoers, and he could not know how they claimed, whether jointly or severally, and if severally, how much each one claimed. Each defendant, of course, had the right to defend for his several portion, and by doing so necessarily disclaimed as to the residue, but this fact did not entitle such defendant to a separate trial, nor did it make the action multifarious. *Greer v. Mezes*, 24 How. 268, 16 L. Ed. 661.

The same rule applies to actions brought to determine the rights of adverse claimants, or actions to quiet title. The plaintiff may make all of the adverse claimants defendants, even though there should be no privity or connection between them. As was said in *Kincaid v. McGowan*, 88 Ky. 91, 4 S. W. 802:

"It seems clear that in an equitable action to quiet the title to land, independently of the statutory authority, all of the adverse claimants, whether by independent

Jan. 1908]

Statement of Case.

titles or not, may be joined as defendants. Indeed, as the object to be accomplished is the putting of all litigation about the title to rest, it is not only desirable, but proper to make all adverse claimants defendants."

See, also, *Stemmler v. McNeill*, 102 Fed. 660; Pomeroy, Remedies, § 369 *et seq.*; 15 Cyc. 83; 17 Ency. Plead. & Prac., 323.

We conclude, therefore, that the trial court erred in sustaining the demurrer. The judgment appealed from is reversed, and remanded with instructions to reinstate the case and overrule the demurrer.

RUDKIN, MOUNT, ROOT, and DUNBAR, JJ., concur.

[No. 6785. Decided January 15, 1908.]

PEDER PEDERSON, *Appellant*, v. FRED LEASE, JUNIOR,  
*Respondent*.<sup>1</sup>

EXECUTIONS—REQUISITES—OBJECTIONS. An execution commencing, "State of Washington, Clallam County, ss: To the sheriff of Clallam County, Greeting:" will not be held void because not running in the name of the state, where no objection was made to the confirmation of the sale.

SAME—NAME OF DEFENDANT—IDEM SONANS. An execution against "Peter Peterson" whose true name was Peder Pederson, but who was sued as Peter Pederson and was commonly known as Peter Peterson, will not invalidate a sale thereunder, but is controlled by the rule of *idem sonans*.

SAME—SALE—OBJECTIONS. An execution sale will not be invalidated by failure of the execution to state the amount due or to command the sheriff to levy upon real property upon which the judgment is a lien, where no objection to confirmation was made and the purchaser had held the property and paid the taxes for twelve years.

Appeal from a judgment of the superior court for Clallam county, Hatch, J., entered January 27, 1906, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

<sup>1</sup>Reported in 93 Pac. 439.

*Trumbull & Trumbull*, for appellant.

*A. A. Richardson*, for respondent.

ROOT, J.—Plaintiff brought this action to quiet title to certain lots in Port Angeles, Clallam county, alleging ownership and that the real estate was unoccupied. From the judgment in defendant's favor plaintiff appeals.

It appears that plaintiff owned this property in 1895, at a time when one Fred Lease, father of respondent, obtained judgment against plaintiff in the justice court of Clallam county. The transcript of this judgment was, on the 1st day of June, 1895, filed and entered in the office of the clerk of the superior court of said county, and on the 26th day of July, 1895, an execution was issued out of the superior court upon said judgment, and the property in question levied upon and sold to said Fred Lease, and the sale confirmed by order of court on December 19, 1896, no exceptions or objections to the confirmation having been interposed. No redemption has been had. Fred Lease died on the 26th day of June, 1902, and it is conceded that respondent herein is his sole heir. Taxes have been paid ever since the sale by respondent and his father, a certificate having at one time been issued to appellant and redeemed by respondent.

Appellant contends that the sale of the property was void, first, because the execution did not run in the name of the state of Washington; second, did not state the amount actually due; third, did not command the sheriff to levy upon the real property upon which the judgment is a lien; fourth, that it was not issued against the property of appellant but against that of one "Peter Peterson."

The execution complained of reads, in the commencement thereof: "State of Washington, Clallam County, ss: To the sheriff of Clallam County, Greeting:" and then proceeds in the usual form followed in executions. It may be that this form is not strictly in compliance with the statute and constitution, but we are not prepared to hold that it was fatally de-

Jan. 1908]

Opinion Per Root, J.

fective; and inasmuch as no objections were made to the confirmation of the sale, we cannot hold the sale void by reason of this alleged defect.

As to the error in the name of plaintiff, it appears that he was sued as "Peter Pederson," in the justice court; that he appeared in response to such name at that time, and defended the action in person, testifying therein as a witness. He consequently had personal knowledge of the entry of the judgment and that his name was misspelled in the proceedings. That another error was made in the spelling in the execution was not, in our opinion, sufficient to render the sale thereunder void. The name "Peter Pederson" is the English form of the Danish name "Peder Pederson," and we think the question is controlled by the rule of *idem sonans*. *Schooler v. Asherst*, 1 Littell (Ky.) 216, 13 Am. Dec. 232-4, and notes. It appears from the evidence that appellant was well known in the community under the name of Peter Peterson.

The contentions that the execution does not state the amount actually due and does not command the sheriff to levy upon the "real property upon which the judgment is a lien" we cannot hold, at this late day, sufficient to invalidate the sale, no objections to the confirmation having been made and the purchaser at such sale and his successor in interest having held and paid taxes upon the property for over twelve years. *Terry v. Furth*, 40 Wash. 493, 82 Pac. 882.

We think the judgment and decree of the trial court should be affirmed and it is so ordered.

FULLERTON, MOUNT, DUNBAR, and RUDKIN, JJ., concur.  
HADLEY, C. J., and CROW, J., took no part.

[No. 6872. Decided January 15, 1908.]

THEODORE MATSON *et al.*, *Appellants*, v. ANDREW J. JOHNSON  
*et al.*, *Respondents*.<sup>1</sup>

DEEDS—ACKNOWLEDGMENT. An unacknowledged deed is good as between the parties, and conveys at least equitable title.

SAME—DELIVERY—INTENT. A deed is effective without manual delivery where it was executed by a father to his minor children, during his last sickness, at the time of executing a will of all his other property, and with the expressed intent of conveying the property.

EXECUTORS—SALES—BONA FIDE PURCHASERS. The rule of caveat emptor applies to purchasers at an executor's sale of real property, who take only the interest of the estate.

Appeal from a judgment of the superior court for Kitsap county, Yakey, J., entered February 28, 1907, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to quiet title as against purchasers at an executor's sale. Reversed.

*S. S. Langland*, for appellants.

*Willett & Willett*, for respondents.

RUDKIN, J.—F. Lanston died testate in Kitsap county in this state on the 15th day of June, 1902. During his last illness and a few days before his death, he called in one of his neighbors and directed him to prepare a deed and will in order that he might execute them. A deed was accordingly prepared purporting to convey the property now in controversy to the three minors who are plaintiffs in this action. The instrument was signed by the grantor in the presence of two witnesses, but was not acknowledged because there was no officer present authorized by law to take the acknowledgment of deeds. The grantor stated to those present that he would

<sup>1</sup>Reported in 93 Pac. 324.

Jan. 1908]

Opinion Per RUDEKIN, J.

appoint Mr. Johnson as his executor, and would instruct him to have the deed acknowledged and properly executed. The property described in the deed was of the value of about \$100 and was the only real property owned by the grantor. At the time of the execution of this deed and as part of the same transaction, Lanston executed a will making various small bequests which are not material here. The following endorsement was made at the foot of the will by direction of the testator: "Ed Johnson are hereby empowered to appear for the Notary Public to have inlaid deed executed." What disposition was made of the will and deed after their execution does not appear, but both instruments were delivered to the executor some time after Lanston's death and were by him filed in the office of the clerk of the superior court, the will under date of June 18th and the deed on June 23d, 1902. The deed was not filed for record in the auditor's office until February 1, 1906. At the time of the execution of the deed and will, Lanston was the owner of the real property described in the deed and about \$500 cash in bank. The will was admitted to probate and Johnson appointed executor thereof. On the 25th day of November, 1905, the real property now in controversy was conveyed to the defendants in this action by the executor of the will, pursuant to an order of the superior court made and entered in the estate matter. The present action was instituted by the grantees named in the above deed, through their guardian *ad litem*, to quiet their title as against the purchasers at the executor's sale, and from a judgment in favor of the defendants, the present appeal is prosecuted.

Three questions have been presented for the consideration of this court: (1) Was the Lanston deed ineffective for lack of an acknowledgment on the part of the grantor; (2) was there a delivery of the deed; and, (3) are the defendants *bona fide* purchasers.

First. An unacknowledged deed is good as between the parties in this state. Such an instrument conveyed at least an equitable title. Devlin, Deeds (2d ed.), § 465; *Edson v. Knox*, 8 Wash. 642, 36 Pac. 698; *Carson v. Thompson*, 10 Wash. 295, 38 Pac. 1116; *Bloomingtondale v. Weil*, 29 Wash. 611, 70 Pac. 94.

Second. Was there a delivery of the deed?

"Actual manual delivery and change of possession are not required in order to constitute an effectual delivery. But whether there has been a valid delivery or not must be decided by determining what was the intention of the grantor, and by regarding the particular circumstances of the case. Where a father had indicated in various ways that certain property should be bestowed at his death upon his infant son, and for that purpose had executed a deed, of which he, however, retained the possession, effect was given to his intention, despite the fact that there had been no manual delivery of the deed." 1 Devlin, Deeds (2d ed.), § 269.

In *Atwood v. Atwood*, 15 Wash. 285, 46 Pac. 240, this court said:

"In coming to these conclusions we have not lost sight of the able argument and large array of authorities contained in the brief of appellant, to the effect that the delivery of a deed does not necessarily require any formal act on the part of the grantor; that it is often a question of intention; that a deed may become operative while the manual possession is retained by the grantor. But in such cases, before the court can find a delivery, the intention to consummate the transaction so as to fully vest the title in the grantee must be clearly shown, and neither the findings of fact by the referee nor by the superior court, nor the evidence in the case, satisfies us that the grantor in the deed under consideration ever did anything with the intention that by doing it he had so delivered the deed as to make it presently operative."

What was lacking in the *Atwood* case, viz., the intention to consummate the transaction so as to fully vest the title in the grantee, was, in our opinion, clearly and unequivocally shown in this case. The will and deed were executed at the same

Jan. 1908]

Syllabus.

time and as a part of the same transaction. The real property was omitted from the will, no doubt advisedly, and all the surrounding circumstances show conclusively that the grantor intended to convey his real property to these minors, that the deed was executed for that purpose; and in our opinion the mere absence of an acknowledgment is not sufficient to defeat his expressed intentions.

Third. The respondents were not *bona fide* purchasers, as that term is understood in the law. The rule of *caveat emptor* applies in all its vigor to sales by administrators or executors in this state, and the purchaser acquires only the interest of the estate. *Towner v. Rodegeb*, 33 Wash. 153, 74 Pac. 50, 99 Am. St. 936, and cases cited.

We are therefore of opinion that the appellants have shown a clear title to the lands in controversy, as against the respondents, and the judgment of the court below is accordingly reversed, with directions to enter judgment as prayed in the complaint.

HADLEY, C. J., FULLERTON, and CROW, JJ., concur.

DUNBAR and ROOT, JJ., took no part.

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[No. 7030. Decided January 15, 1908.]

THE STATE OF WASHINGTON, *Respondent*, v. CHARLES  
McFADDEN, *Appellant*.<sup>1</sup>

CRIMINAL LAW—PARTIES—HOMICIDE—ACCESSORY TO MANSLAUGHTER. Under Bal. Code, § 6782, abolishing all distinctions between an accessory before the fact and a principal, a person counseling and abetting a manslaughter may be indicted and punished as a principal.

HOMICIDE—MANSLAUGHTER—INFORMATION—SUFFICIENCY. An information charging a physician with manslaughter in counseling and directing the withholding of food, save water and the juices of fruit, "and such other nourishment as he, the said C. McF. might direct," is insufficient in simply alleging that his directions were followed and the food given was insufficient to sustain life, since that

<sup>1</sup>Reported in 93 Pac. 414.

is in the nature of a conclusion; and it is necessary to set forth a specific statement of all his directions, showing the kind and quantity of nourishment directed to be given and that starvation was the necessary result.

Appeal from a judgment of the superior court for Asotin county, Miller, J., entered April 22, 1907, upon a trial and conviction of the crime of manslaughter. Reversed.

*S. G. & H. G. Cosgrove* and *Sturdevant & Bailey*, for appellant.

*Geo. H. Rummens*, for respondent.

HADLEY, C. J.—The defendant was charged with the crime of manslaughter. The information is very long and circumstantial in its allegations, but in substance it charges that the defendant represented to one Ida Robison that he was a physician; that the representations were made for the purpose of inducing her to believe that he was a skillful and qualified physician; that believing said representations and relying thereon, she employed him to treat her minor child, a daughter, of the age of about nine months; that she placed the child under the direction and supervision of the defendant to be treated by him as such physician; that he at once assumed the relation of physician toward the child, and that while so acting he prescribed and directed that the child should be given no food or nourishment save water and the juices of fruit, and such other nourishment as he might direct; that acting under such instruction, she thereafter withheld from the child all food and nourishment, except as directed by the defendant, for a number of days; that the food which was given under the defendant's direction was insufficient to sustain the life of the child, and she thereupon became weak and emaciated; that the mother became convinced that said treatment was not proper for the child and she thereupon gave the child a small quantity of wholesome food, which was beneficial and not detrimental to her health; that

Jan. 1908]

Opinion Per HADLEY, C. J.

she informed the defendant she had so given the food, and he thereupon remonstrated with her and assured her and led her to believe that the treatment he directed was necessary for the cure and relief of the child; that thereupon the mother again kept all food from the child, except as directed by the defendant, for a great number of days, and during all of said times she faithfully complied with all requests and instructions of the defendant in relation to the treatment of the child; but by reason of such treatment, so directed by the defendant, the child became weak, emaciated and starved; that the defendant was at all times grossly ignorant and unlearned in the proper and necessary treatment of diseases, and the treatment which he prescribed and directed for the child was grossly improper and dangerous to its life; that the child was during all said times under the care and direction of the defendant as aforesaid, and that on account of the treatment so administered and the withholding of food as alleged, the child died. A demurrer to the information was overruled, after which the defendant pleaded not guilty, and he was tried and convicted. He has appealed.

It is assigned that the court erred in overruling the demurrer to the information. It is urged that the facts alleged against appellant do not amount to a charge of manslaughter, for the reason that it was not appellant but the mother who withheld the food from the child. It is contended that the information shows that appellant did not assume to administer the food, but that the mother at all times did so, and that the real physical act which it is alleged caused death was that of the mother, the appellant being at the time not personally present but having advised the mother to do the act. It is argued that such facts can in no event amount to other than a charge that appellant was an accessory before the fact, whereas the authorities hold that there cannot be such an accessory to the crime of manslaughter. This court so held in *State v. Robinson*, 12 Wash. 349, 41 Pac. 51, 902. Our

statute, Bal. Code, § 6782 (P. C. § 2001), however, abolishes all distinctions between an accessory before the fact and a principal, and provides that "all persons concerned in the commission of an offense, whether they directly counsel the act constituting the offense, or counsel, aid and abet in its commission, though not present, shall hereafter be indicted, tried, and punished as principals." Under the said statute appellant may be, and is, charged here as a principal and not as an accessory. Manslaughter is defined by our statute, Bal. Code, § 7042 (P. C. § 1560), as follows:

"Every person who shall unlawfully kill any human being without malice, express or implied, either voluntarily upon a sudden heat, or involuntarily, but in the commission of some unlawful act, shall be deemed guilty of manslaughter."

The charge does not amount to that of killing "voluntarily upon a sudden heat," and if manslaughter is charged it is that of involuntarily causing death "in the commission of some unlawful act." The unlawful act charged is that of withholding food, not by his personal physical act but by counseling the mother to do it. His share in the offense was therefore that of counseling and advising the mother what to do. It then becomes vitally important, in order to put him upon trial for a felony, that just what he did advise must be charged. It is charged that he advised the giving of no food save water and the juices of fruit "and such other nourishment as he, the said Charles McFadden, might direct." There is no allegation as to what other nourishment he directed given, although it must be reasonably understood from the language that he did give other directions. It is alleged that the mother followed his directions and that the food given was insufficient to sustain life. But under such peculiar circumstances, that is the statement of a single extreme fact in the nature of a mere conclusion. In so important a matter where he is charged with involuntarily causing the death of a human being, he is entitled to a full and specific statement of what

Jan. 1908]

Opinion Per HADLEY, C. J.

the state claims were all of his directions as to the giving or withholding of food from time to time, including a statement as to every kind of nourishment directed, the quantity thereof, and when it was to be given. In short, such a connected chain of facts should be alleged as show starvation as the necessary and certain result of appellant's directions. Under the terms of Bal. Code, § 6840 (P. C. § 2093), he is entitled to "A statement of the acts constituting the offense, in ordinary and concise language, without repetition, and in such manner, as to enable a person of common understanding to know what is intended."

From the terms of the information it cannot be determined what food appellant ordered given, or withheld, or in what quantities. The information epitomized says that the child was starved by the withholding of food through appellant's advice; not all food but merely some kinds of food, without specifying what kinds or what quantities were directed or given. Such a statement of facts is not sufficient to show that appellant's directions caused the death of the child. We therefore think the demurrer to the information should have been sustained, and inasmuch as the judgment must be reversed for that error, it is unnecessary to discuss other questions mentioned in the briefs.

The judgment is reversed, and the cause remanded with instructions to sustain the demurrer to the information.

CROW, ROOT, and RUDKIN, JJ., concur.

MOUNT and FULLERTON, JJ., took no part.

[No. 6770. Decided January 15, 1908.]

*E. B. Cox, as Receiver of the Washington Food Company,*  
*Appellant, v. J. P. Dickie et al., Respondents.*<sup>1</sup>

CORPORATIONS—SUBSCRIPTIONS TO STOCK—ACTIONS TO ENFORCE—DEFENSES—ESTOPPEL. It is no defense to an action by the receiver of an insolvent corporation, brought for the benefit of creditors against stockholders on their unpaid stock subscriptions, that the stock was purchased bona fide as fully paid, that the stock was not fully subscribed, or the corporation a legal one, or that they subscribed on false representations believing that the company was not in debt; defendants being estopped to set up such defenses as to creditors.

SAME—NOTICE OF ASSESSMENTS—SUFFICIENCY. Under Bal. Code, § 4262, requiring notice of assessments on unpaid stock to be given personally or by publication, notice by the receiver of an insolvent corporation, given by mailing and publication, as ordered by the court, is sufficient.

SAME—ACTIONS—PARTIES. The receiver of an insolvent corporation may join all the stockholders in an action to recover the amount of their unpaid stock subscriptions.

SAME—SUBSCRIPTIONS—NAME OF COMPANY. A change in the name of a corporation does not release subscribers to the capital stock, where the subscriptions were given in the name at first intended to be used, but were intended for and in fact subscriptions to the company afterwards incorporated under another name, the two being one and the same company.

Appeal from a judgment of the superior court for King county, Albertson, J., entered March 14, 1907, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action upon the unpaid subscriptions to corporate stock. Reversed.

*H. R. Clise*, for appellant.

*Ira Bronson* and *D. B. Trefethen*, for respondents Dickie *et al.*

*Shank & Smith*, for respondent Crossett.

<sup>1</sup>Reported in 93 Pac. 523.

Jan. 1908]

Opinion Per MOUNT, J.

MOUNT, J.—This action was brought by the appellant as receiver of the Washington Food Company, against a large number of defendants, upon their unpaid stock subscriptions in that company. The cause was tried to the court without a jury, and findings were made to the effect, that the Washington Food Company was not legally incorporated because the articles of incorporation were not executed and filed as required by law and the capital stock was not fully subscribed; that the defendants subscribed for their stock believing that there was no indebtedness against the corporation, and that the amount paid for the stock, being one-half the par value thereof, was the limit of liability thereon because the stock was represented to be, and was, denominated "treasury stock fully paid and nonassessable." For these reasons the action was dismissed. The receiver has appealed from the order of dismissal.

The facts in the case are substantially as follows: In the year 1903 certain of the defendants, desiring to organize a company for the manufacture of breakfast foods, in the city of Ballard, called public meetings in that city wherein the advisability of organizing such a company was discussed. After several of these meetings it was decided to incorporate such a company, and the persons who were to act as trustees thereof were elected at one of these meetings. The name of the corporation first adopted was the "Honeyed Flake Food Company." Subscriptions for the capital stock thereof were solicited and made under that name, but later, on or about December 23, 1903, it was decided to incorporate under the name of the Washington Food Company, and articles of incorporation were prepared, executed, and acknowledged under that name. These articles were executed in triplicate, one copy filed in the auditor's office of King county, where the principal office was located, one copy sent to the secretary of state at Olympia, and the other was kept by the company. These articles were not exact copies because some of the

copies contained more names of incorporators than others. More than three of the same persons, however, executed all of the copies. The articles provided that the capital stock of the company was \$100,000, divided into two thousand shares of the par value of \$50 each. The stock was not fully subscribed, and subscriptions were being taken therefor both before the articles were filed and afterwards. Each person subscribing for stock was required to pay \$25 per share in cash, with the agreement that the stock was thereby fully paid and nonassessable.

After certain subscriptions had been made, and at a public meeting attended by stockholders and others, the trustees were instructed to purchase a site and let a contract for the erection of a building thereon, which the trustees did. Subsequently the building was completed, and machinery purchased and the same put into operation. During all this time subscriptions for stock were being made on terms as above stated, the total subscriptions amounting to nine hundred and seventeen shares. In the erection of the building and operation thereof, the company became largely indebted, and on December 28, 1904, the appellant was appointed receiver of the property and effects of the corporation, by the superior court of King county. The receiver qualified, and after exhausting the assets of the corporation, there was still about \$7,000 of indebtedness due the creditors of the corporation. Thereupon the superior court by order directed the receiver to collect by suit from the stockholders the balance of the unpaid stock held by them, and to publish a demand therefor in the Seattle Post-Intelligencer, and to mail a copy of such demand to each of the stockholders at his postoffice address, as shown by the books of the company. This was done, and afterwards this action was begun.

The defense is based upon the points stated in appellant's brief as follows: (1) The stock was purchased *bona fide* as treasury stock at a fixed value; (2) fraudulent misrepresenta-

Jan. 1908]

Opinion Per MOUNT, J.

tions induced the subscriptions to stock, there being no sufficient circumstances to create an estoppel or waiver; (3) no full subscription to the capital stock of the company; (4) trust fund theory not applicable to this case since there is no showing that the creditors relied on the stock subscriptions; (5) defect of organization of the company; (6) no notice of call for stock subscriptions; (7) this suit should have been instituted as a separate proceeding against the stockholders instead of being made a joint action; (8) there should be no liability against those whose names appeared in the Honeyed Flake Food Company subscription list; (9) the receiver should have sued for only so much of the unpaid subscription as was necessary to pay for the debts of the company; (10) all of the stockholders should have been made parties defendant under the court's order.

The first five of these defenses may be considered together. It must be remembered that this is not an action by the corporation to enforce collection of subscriptions for stock or its contracts with its subscribers, but is an action brought by a receiver, under order of the court, to enforce such subscriptions for the benefit of creditors. As between the corporation itself and the stockholders all these defenses would probably be good, but as between the stockholders and the creditors of the corporation another rule prevails. *Adamant Mfg. Co. v. Wallace*, 16 Wash. 614, 48 Pac. 415. In such cases,

"It is no defense to a suit by a creditor to recover his debt out of an unpaid subscription, that the defendant was induced to subscribe to the stock by fraudulent misrepresentations of the agent of the corporation, or by an agreement which the corporation had failed to carry out, or that the corporation was irregularly organized or organized for an illegal purpose, or has been dissolved; nor can a stockholder set up informalities in the issue of the stock if the corporation had the power to create it, though he may show that the stock

is void as having been issued in excess of the limit imposed by the charter." 26 Am. & Eng. Ency. Law (2d ed.), p. 1011. See, also, 10 Cyc., pp. 244 and 249; *Mitchell v. Matheson*, 23 Wash. 723, 63 Pac. 564; *Cole v. Satsop R. Co.*, 9 Wash. 487, 37 Pac. 700, 43 Am. St. 858.

Under this rule the trial court was clearly in error in basing the judgment of dismissal upon the facts found as stated above. Such facts if true did not constitute a defense in this action, because the stockholders were estopped to say that the corporation was not a legal one, or that they had a contract with the corporation to purchase its stock at fifty per cent of its par value, or that they subscribed for its stock believing the company was not in debt. The receiver in this action represents the creditors. *Mitchell v. Matheson, supra*.

Respondents also contend that there was no personal notice of a call for stock subscriptions, and that for this reason the judgment must be sustained. The statute provides:

"In all cases notice of each assessment shall be given to the stockholders personally, or by publication in some newspaper published in the county in which the principal place of business of the company is located." Bal. Code, § 4262 (P. C. § 7064).

It was held by this court in *Elderkin v. Peterson*, 8 Wash. 674, 36 Pac. 1089, that the notice required by this section applies to assessments made by the court against stockholders, but neither the statute nor the decision in *Elderkin v. Peterson* requires personal notice. Constructive notice by publication may be substituted for personal notice. The proof in this case shows that the court ordered the receiver to collect the unpaid subscription, and directed notice by publication and by mail. The receiver testified that such notice was given, that he had a notice published as required by the order, and that he mailed a letter containing a copy of the same to each of the stockholders as directed by the order. It is true that a large number of the defendants testified that they did not

Jan. 1908]

Opinion Per MOUNT, J.

receive such letter or know of the publication, but actual personal notice was not required. The proof was therefore sufficient upon the question of notice.

Respondents next contend that a separate action should have been brought against each stockholder. It is true this court held in *Elderkin v. Peterson, supra*, that the receiver may bring separate actions in cases like this, but we have no statute *requiring* separate actions in such cases, and since each defendant in this case was at liberty to make his separate defense, no prejudicial error can be based upon the fact that a large number of defendants were joined in this action. In fact, the form of the action adopted here was beneficial to the defendants by reason of the saving of costs.

It is also contended by the respondents, and especially by respondent Crossett, who appears by separate counsel and separate brief, that there is no liability against those who subscribed for stock on the Honeyed Flake Company subscription list. But the facts show conclusively that the Honeyed Flake Company and the Washington Food Company were the same company. It was intended to give the company the former name, but that idea was abandoned and the latter name chosen as being the more appropriate, and the subscription given to the Honeyed Flake Company was intended for, and in fact was, a subscription to the company which was incorporated as the Washington Food Company. The mere change in the name did not release the subscribers.

In view of the rule that the receiver might have brought a separate action against each stockholder, it is unnecessary to notice the remaining points presented by respondents. For the reasons above stated the judgment of the trial court is reversed, and the cause remanded with instructions to enter judgment against each of the defendants as requested by appellant at the time of the trial.

HADLEY, C. J., CROW, and DUNBAR, JJ., concur.

FULLERTON, RUDKIN, and ROOT, JJ., took no part.

[No. 6793. Decided January 15, 1908.]

G. H. BROWN *et al.*, Appellants, v. W. P. TRIMBLE *et al.*,  
*Respondents.*<sup>1</sup>

MECHANICS' LIENS—NOTICE—AMENDMENT—SUFFICIENCY OF ORDER. In an action to foreclose a mechanics' lien, leave to amend a complaint which set forth an indefinite notice of lien does not authorize the filing of an amended notice of lien, under Bal. Code, § 5904, authorizing the amendment of a notice by order of the court, and a notice filed without leave is properly treated as an original notice, and is insufficient if not filed in time.

Appeal from a judgment of the superior court for Kitsap county, Yakey, J., entered September 12, 1906, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action to foreclose a mechanics' lien. Affirmed.

*Frank B. Sayre*, for appellants.

*John G. Barnes*, for respondents.

MOUNT, J.—The appellants brought this action to foreclose a lien for a balance alleged to be due for plumbing and materials used in the construction of a certain building. The lien notice described the premises as follows:

“That certain building or structure situate upon the following described property, to wit: Blake Island in the county of Kitsap, state of Washington.”

The defendants filed a general demurrer to the complaint. This demurrer was sustained upon the ground that the description of the premises upon which the lien was sought to be foreclosed was not sufficiently definite, it being conceded that Blake Island was composed of some four or five hundred acres of land, all of which was not owned by the defendants. Leave was thereupon granted to the plaintiffs to amend the com-

<sup>1</sup>Reported in 93 Pac. 317.

Jan. 1908]

Opinion Per MOUNT, J.

plaint. Subsequently, on February 5, 1906, plaintiffs filed with the county auditor of Kitsap county another lien notice. Thereupon the plaintiffs filed what was termed an amended complaint, setting up this last-mentioned lien notice and praying foreclosure thereof for balance alleged to be due. The respondents filed an answer denying generally all the allegations of the complaint. The cause then came on for trial. The plaintiffs offered in evidence the last-named lien notice, which showed upon its face that the last services and materials were furnished on May 13, 1905, and that the lien notice was not filed until February 5, 1906, more than eight months intervening between the date of the last labor and materials furnished and the date of the filing of the lien notice. On objection, the court excluded this evidence. The statute requires the lien notice to be filed within ninety days from the date of the cessation of labor or the furnishing of materials. Bal. Code, § 5904 (P. C. § 6106).

Appellants contend that the notice in this case was an amended notice, and that the court should have received the same in evidence under the provisions of the same section, as follows:

“And such claim of lien may be amended in case of action brought to foreclose the same by order of the court, as pleadings may be in so far as third parties shall not be affected by such amendment.”

Conceding, without deciding, that an amendment to a lien notice may be made after the expiration of the ninety-day period, the amendment of the lien notice in this case, if the notice last filed may be said to be an amendment, was not filed or amended *by order of the court*. Permission to amend the complaint did not authorize the appellants to file a new lien notice or even to amend the original lien notice. If the appellants desired to amend the lien notice as well as the complaint, the application and order therefor should have been so stated. Not having done so, we think the trial court was

right in treating the subsequent lien notice as an original notice which was filed out of time, and therefore of no force.

It is not necessary to discuss other points in the case. The judgment must therefore be affirmed.

HADLEY, C. J., CROW, RUDKIN, and FULLERTON, JJ., concur.

DUNBAR and ROOT, JJ., took no part.

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[No. 6833. Decided January 15, 1908.]

JAMES FOLEY, *Appellant*, v. MARGARET McDONNELL,  
*Respondent*.<sup>1</sup>

EXECUTORS AND ADMINISTRATORS—CLAIMS—NECESSITY OF PRESENTATION. Under Bal. Code, § 6199a, creditors must present their claims to the executor of a nonintervention will within one year after publication of notice to creditors, as in other cases, or they will be barred.

SAME—FAILURE TO PRESENT CLAIMS — PRESUMPTION — PLEADING. The law presumes that the executor of a nonintervention will will seasonably publish notice to creditors, as required by statute, and a complaint upon a claim is demurrable where the action was not commenced until five years after testator's death, and there is no allegation that notice to creditors was not given, or any excuse shown for the delay.

WILLS—TRUST FOR CREDITORS—CONSTRUCTION. A will making the executrix a trustee for the purpose of paying creditors applies only to creditors who qualify by proving their claims, after publication of notice to creditors.

Appeal from a judgment of the superior court for Clarke county, McCredie, J., entered March 16, 1907, in favor of the defendant, upon sustaining a demurrer to the complaint, dismissing an action against an executrix to enforce a trust for the benefit of creditors. Affirmed.

<sup>1</sup>Reported in 93 Pac. 321.

Jan. 1908]

Opinion Per MOUNT, J.

*Thos. O'Day and G. R. Percival*, for appellant.

*Milton W. Smith*, for respondent.

MOUNT, J.—The lower court sustained a demurrer to the complaint in this case. Plaintiff refused to amend, and an order of dismissal was entered. Plaintiff appeals from that order.

The complaint in substance alleges, that on April 21, 1896, plaintiff obtained a judgment against Columbus McDonnell for the sum of \$958.62, besides attorney's fees and costs, upon a promissory note; that said judgment was obtained in the state of Oregon, after personal service upon said Columbus McDonnell; that subsequently execution was issued in Oregon and returned *nulla bona*; that at the time said judgment was rendered the said Columbus McDonnell was alive, and that the defendant in this action was his wife; that afterwards on the 12th day of March, 1901, said Columbus McDonnell, being then the owner of a large amount of property situate in Clarke county in this state, made his will which, omitting formal parts, is as follows:

"1. I direct that my just debts and funeral expenses be first paid out of my estate.

"2. I give and bequeath unto my executrix hereinafter named all my property, both real and personal, wherever situated, in trust for the purposes herein set forth.

"3. I give, devise, and bequeath unto my beloved wife, Margaret McDonnell, all my property of every kind and nature, real, personal, and mixed, wherever situated.

"4. I do not give, devise or bequeath anything to my children . . . knowing that my wife will make such provisions for them as will be right and just.

"5. I hereby nominate, constitute and appoint my wife, Margaret McDonnell the executrix of this my last will and testament, and I direct that no bonds will be required of her, and she is hereby authorized and empowered to sell and dispose of at private sale or otherwise and in any way she shall deem best any or all of my property, both real and personal, with-

out the intervention of any court, and I hereby revoke all former wills and codicils to wills by me made.

"In witness whereof," etc.;

that thereafter, on April 29, 1901, said Columbus McDonnell died in Clarke county, Washington, seized of and owning certain property described; that on May 25, 1901, said will was duly probated in Clarke county, Washington, and the defendant herein, Margaret McDonnell, was appointed executrix and accepted the trust, took possession of all of said property, and now holds and claims the same as executrix, legatee, and trustee under such will; that said property is of the value of \$30,000, and passed to defendant by the terms of the will, in trust for the benefit of creditors of said Columbus McDonnell, deceased; that plaintiff is one of such creditors, and that the said estate is solvent, and that there is now more than sufficient to pay all the creditors thereof; that defendant has been requested to pay the plaintiff the amount due upon the said judgment, but has failed and refused to do so; that Columbus McDonnell, deceased, left no property in the state of Oregon, and plaintiff has no plain, speedy, and adequate remedy at law for the recovery of the amount due on said judgment, and applies to the court to compel the defendant to execute the trust which she is required to do under said will.

It is contended by the respondent that the action is barred under the statute. It will be noticed that there is no allegation that any claim was ever presented to the executrix and allowed as a claim against the estate, or that no notice to creditors was published as required by law. If the action was brought against the defendant as administrator or executrix of the estate of Columbus McDonnell, deceased, the complaint must show that the claim was first presented to the executor or administrator in order to state a cause of action. Bal. Code, § 6235 (P. C. § 2540). *McFarland v. Fairlamb*, 18 Wash. 601, 52 Pac. 239.

Jan. 1908]

Opinion Per MOUNT, J.

The appellant argues that the will above set out makes the defendant a trustee of an express trust, and that, inasmuch as the will is a nonintervention will, it was not necessary for the plaintiff to present a claim to the executrix or trustee within one year or at all, because the statute of limitations has no application as between the *cestui que trust* and the trustee of an express trust. The statute relating to nonintervention wills provides:

"In all cases where it is provided in the last will and testament of the deceased that the estate shall be settled in a manner provided in such last will and testament, and that letters testamentary or of administration shall not be required, and where it also duly appears to the court, by the inventory filed, and other proof, that the estate is fully solvent, . . . it shall not be necessary to take out letters testamentary or of administration, except to admit to probate such will, . . . And after the probate of such will and the filing of such inventory all such estates may be managed and settled without the intervention of the court." Bal. Code, § 6196 (P. C. § 2489).

It will be noticed that the will in this case does not provide that letters testamentary or of administration shall not be required. It does, however, provide that the executrix shall sell and dispose of all the property as she may deem best without the intervention of any court. Conceding, however, that this will was intended to be, and is, a nonintervention will, still the statute in the same section provides:

"That in all such cases the claims against such estates shall be paid within one year from the date of the first publication of notice to creditors to present their claims, unless such time be extended by the court for good cause shown, for a reasonable time."

And Bal. Code, § 6199a (P. C. § 2493), provides:

"Upon a publication of notice to creditors to present their claims to such executor, for a period of time and in the manner required of executors and of administrators holding letters testamentary and of administration under the laws of

this state, said creditors shall be required to present their claims to the said executor within one year from the date of the first publication of said notice, and if they fail to do so their claim shall be barred."

These two provisions last above quoted seem to make it clear that, in cases of nonintervention wills, creditors shall present their claims within one year of the publication of notice, and failure so to do bars such claim the same as in other classes of wills. It is true this court held otherwise in *Moore v. Kirkman*, 19 Wash. 605, 54 Pac. 24, and possibly in other cases. But these cases arose under the statute before 1897, when the amendments above quoted were made to the statute in force at that time. Under the present statute, we are of the opinion that it is the duty of the executor, under wills like the one in question, to publish a notice to creditors, and failure of the creditors to file a claim within the year bars such claim. It is true the will in this case makes the executrix trustee of the estate for the purpose of paying creditors, but this means such creditors only as qualify by proving their claims within time, as in other estates, and thereby making themselves beneficiaries of the trust. When this is done, the rule contended for by the appellant would no doubt apply.

The complaint does not allege that no notice was published, and we must therefore assume that the executrix did her duty and seasonably published such notice. Columbus McDonnell died in April, 1901. This action was not begun until September, 1906, and no cause is shown for the delay. We are of the opinion, therefore, that the action is barred and the judgment must be affirmed.

HADLEY, C. J., CROW, RUDKIN, and FULLERTON, JJ., concur.

DUNBAR and ROOT, JJ., took no part.

Jan. 1908]

Statement of Case.

[No. 6853. Decided January 15, 1908.]

THE STATE OF WASHINGTON, *on the Relation of O. P.  
Burrows et al., Plaintiff*, v. THE SUPERIOR COURT FOR  
CHEHALIS COUNTY *et al., Respondents*.<sup>1</sup>

EMINENT DOMAIN—PETITION—DESCRIPTION OF PROPERTY—BOOM COMPANIES. In condemnation proceedings by a boom company, the petition sufficiently describes the property sought to be taken, where the facts are alleged as to its present and proposed construction of its boom, that the relators' lands, described by reference to government surveys, are contiguous thereto, and condemnation is asked of certain definite shore rights and privileges appurtenant to said lands, where it is not sought to take any lands by metes and bounds.

SAME—DEFENSES—INSUFFICIENCY OF PROPERTY. Condemnation of certain shore rights and privileges for the use of a boom company cannot be objected to on the ground that the rights to be condemned are not sufficient to enable it to transact its public business without the use of other property belonging to the defendants.

SAME—PROPERTY SUBJECT. Riparian rights and privileges appurtenant to the shore line of a navigable river are property, subject to condemnation for the use of a public service boom company.

SAME—LOGS AND LOGGING—BOOM COMPANIES. Where a boom company's plat was made from the government field notes of the meanders of a river, and shows the contiguous land, it is sufficient to authorize condemnation proceedings to appropriate the use of an unmeandered slough extending into such contiguous lands, within Bal. Code, § 4379, requiring the map to show such of the shore lines of waters and contiguous lands as are proposed to be appropriated.

SAME—PROCEEDINGS—DEFENSES—ATTEMPT TO PURCHASE. Defendants who denied the right of a boom company to appropriate their property cannot raise the objection that the company did not first attempt to acquire its rights by purchase.

SAME—PUBLIC USE. The fact that no logging is being done upon a stream except by a corporation whose stockholders are identical with those of a boom company, does not show that condemnation of a boom site by such corporation is for a private use.

Certiorari to review an order of the superior court for Chehalis county, Linn, J., entered June 15, 1907, after a hearing

<sup>1</sup>Reported in 93 Pac. 423.

on the merits, adjudging a public use and directing an assessment of damages in a condemnation proceeding. Affirmed.

*J. W. Robinson*, for relators.

*J. B. Bridges* and *Ben Sheeks*, for respondents.

CROW, J.—On March 28, 1907, the Grays Harbor Boom Company, a corporation, instituted in the superior court of Chehalis county three separate proceedings to condemn certain property rights, the first being against O. P. Burrows and wife, the second against J. O. P. Lownsdale and wife, and Ladd & Tilton, and the third against F. K. Hiscock. After preliminary decrees were entered adjudging a public use, all of the defendants, upon stipulation, applied to this court in this one proceeding for a writ of certiorari, and the writ having been issued, the decrees are now before us for final review.

The respondent The Grays Harbor Boom Company was incorporated under the laws of Washington in 1893, with authority to conduct a booming business in the Humptulips river and elsewhere. Within the statutory time it filed in the office of the secretary of state a plat or survey of so much of the shore lines of the waters of the Humptulips river and lands contiguous thereto as it proposed to appropriate, and without unreasonable delay proceeded to construct and operate a boom. Thereafter the relators, claiming it was interfering with certain of their private property rights as riparian owners, instituted equitable actions to enjoin such interference. Decrees in their favor were affirmed in *Burrows v. Grays Harbor Boom Co.*, 44 Wash. 630, 87 Pac. 937; *Lownsdale v. Grays Harbor Boom Co.*, 44 Wash. 699, 87 Pac. 943; and *Hiscock v. Grays Harbor Boom Co.*, 44 Wash. 699, 87 Pac. 943. Later this court, upon motion, entered orders staying enforcement of the several decrees until the respondent could institute and prosecute condemnation proceedings.

The Humptulips river, which empties into Grays Harbor, is, for a distance of three miles above its mouth, subject to a tidal flow which reaches and passes the lands of relators. Within the Lownsdale lands is a navigable tide water slough known as "Jessie's slough," connecting with the river, which the respondent has used, and is now using, in its booming operations. It alleges that its boom commences about the middle of the river near the southern boundary of Lownsdale's land, and extends northerly, occupying that portion of the stream lying between its center and the west bank; that the Jessie slough, which is not meandered, connects with the west side of the river and is practically included in the boom; that the occupancy and use of the slough is necessary for receiving, storing, and sorting logs, which will interfere with its navigation; that in so using the slough it will be necessary for servants of the boom company to also use ten feet of its westerly bank by walking thereon when handling, driving, booming, and sorting logs, such use of the west bank not to be exclusive but concurrent with that of the owners of the land.

The evidence shows that, at the time of the hearing, the upper end of the boom as then constructed was immediately below the land of the relators Burrows and wife; that the United States government had granted the respondent permission to extend its boom further up the river past the Burrows land, leaving for navigation an open channel fifty feet in width on the Hiscock or easterly side of the river; that the respondent was at the time perfecting arrangements to so extend its boom; that the purpose of such extension is to aid navigation; that heretofore logs coming down the river on freshets, in great quantities, not controlled by the respondent, would first fill the boom and then back up and fill the upper channel of the river opposite the lands of Burrows on the west and Hiscock on the east, and that the boom when extended and enlarged will avoid this difficulty, by receiving

all logs and timber products and permitting the eastern channel of the river to remain open for navigation to the width of fifty feet. By these proposed extensions and improvements, respondent is endeavoring to avoid any continuance of the acts enjoined in *Burrows v. Grays Harbor Boom Co.* and the other cases above mentioned, and it contends that such riparian and property rights of the relators as it will hereafter need it is now seeking to condemn.

As against the relators Lownsdale and wife and Ladd & Tilton, respondent asks that it be permitted to condemn and appropriate the right to occupy with sawlogs and other timber products that portion of the river which is between its westerly bank and the boom, also to interfere with the relator's shore rights and right of access to and from their lands, and to appropriate the right to occupy the whole of the waters of the slough within their lands, together with a right of way along its westerly bank as above mentioned.

As against the relators Burrows and wife, respondent asks that it be permitted to appropriate and condemn the right to occupy with sawlogs and other timber products that portion of the Humptulips river opposite their lands, and the right to interfere by so doing with their right of navigation of that portion of the river so occupied, with their right of access to and from their lands, and with their appurtenant shore rights and privileges. As against the relator Hiscock, it asks that it be permitted to appropriate and condemn the right to occupy the waters of the river with logs and other timber products consigned to it where the river borders upon his land, and the right to interfere with his right of navigation and access to and from his lands, and his appurtenant shore rights and privileges.

The relators' first contention is that the preliminary decrees are void, or at least erroneous, for the reason that the descriptions of the property sought to be taken are too indefinite within the requirements of the eminent domain statute.

Jan. 1908]

Opinion Per CROW, J.

Bal. Code, § 5637 (P. C. § 5102). The petitions, after alleging the facts as to the present and proposed construction of the boom, further allege that the lands of the several relators are contiguous to the river. They describe the lands by reference to government surveys and public plats now of record, and then allege that it will be necessary for respondent to occupy the river and interfere with shore rights and privileges of the several relators appurtenant to said lands, as above mentioned. Respondent thus seeks to condemn certain definite rights with which it must necessarily interfere, but asks no other property of the relators Burrows and Hiscock. In other words, it does not seek to take any of their lands by metes and bounds, but only certain private shore rights and privileges appurtenant thereto. As against the Lownsdals, it further seeks to condemn certain rights in the Jessie slough and upon its west bank, which are set forth in the petition and decree. The descriptions are sufficient to identify the property rights sought to be taken and to meet the requirements of the statute.

The relators further contend that the respondent is seeking to condemn limited rights and easements which when taken will be insufficient to enable it to transact its business as a public service corporation without using additional property of the relators not sought to be appropriated. We fail to understand how the respondents' alleged failure to condemn sufficient property for its public needs can afford the relators any ground of complaint. The record shows that the respondent is endeavoring to appropriate such property rights as it thinks it will need in its corporate business, so that it may use the same without disobeying the injunction decrees. That it might do so, the enforcement of those decrees was temporarily suspended by orders of this court, which orders of suspension will become inoperative upon the final determination of these condemnation proceedings. Respondent will then act at its peril if it interferes with any property or rights of

the relators protected by the injunctions, but not appropriated. The relators' rights have been heretofore adjudicated in their equitable actions, and upon the final determination of these condemnation proceedings they will be at liberty to immediately enforce and protect such of their property rights as may be thereafter illegally invaded by the respondent. The condemnation will only authorize it to use property •legally appropriated.

The injunctions were granted in the equitable actions because it appeared that the respondent was taking and damaging certain private property rights of the relators without just compensation, in direct violation of § 16, art. 1, of the state constitution. The respondent contends that it is now endeavoring to proceed in strict compliance with the constitution, the eminent domain statute, and the injunctive decrees, and it should be permitted to do so without being required to condemn, at the relators' instance, lands which it insists it will neither need nor use. If respondent is not proceeding in good faith—a condition not yet appearing—the relators will be afforded ample protection when its bad faith or wrongful acts shall assume substantial form. The relators' riparian rights and interests here involved have been adjudicated to be property rights, which we now hold to be subject to condemnation for public use. This holding is in harmony with principles announced in the following cases pertaining to rights of a somewhat kindred nature: *Hatch v. Tacoma, Olympia & Grays Harbor R. Co.*, 6 Wash. 1, 32 Pac. 1063; *New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 64 Pac. 735, 54 L. R. A. 190; *State ex rel. Smith v. Superior Court*, 26 Wash. 278, 66 Pac. 385; *Seattle Transfer Co. v. Seattle*, 27 Wash. 520, 68 Pac. 90; *State ex rel. Smith v. Superior Court*, 30 Wash. 219, 70 Pac. 484.

Mr. Lewis, in the second edition of his work on Eminent Domain, at § 56, says:

“If property, then, consists, not in tangible things themselves, but in certain rights in and appurtenant to those things,

Jan. 1908]

Opinion Per Crow, J.

it follows that, when a person is deprived of any of those rights, he is to that extent deprived of his property, and hence, that his property may be taken, in the constitutional sense, though his title and possession remain undisturbed; and it may be laid down as a general proposition, based upon the nature of property itself, that, whenever the lawful rights of an individual to the possession, use or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is, *pro tanto*, taken, and he is entitled to compensation."

If riparian rights, right of access, right of light and air, and other kindred, intangible rights appurtenant to real estate, are property, they are certainly such property and such an interest in real estate as an owner would be entitled to alienate, thereby conveying an easement. If such rights may be conveyed, we see no reason why they may not, under the right of eminent domain, be condemned when necessary for public use, without an appropriation of the actual land itself.

The relators further contend that the respondent is not seeking to condemn the westerly bank of the river, although it will necessarily be used as a retaining wall for the boom, and that for this reason it should not be permitted to proceed unless it seeks to appropriate the bank and a portion of their lands also. The respondent insists that it does not intend to use any private property of relators in the banks of the river; that although the banks may at times hold logs in the boom, they also hold the water in the river which floats the logs; that such use of the banks and the water is a necessary incident to the public rights of navigation to which respondent is entitled under the statutes of this state, and that it will only use the banks in the same manner that any other person will use them in navigation. As heretofore suggested, the relators will sustain no loss if the respondent fails to condemn sufficient property rights for its public use.

As to the relators Lownsdale and wife and Ladd & Tilton, it is contended that the map of location filed by the respond-

ent with the secretary of state does not show the Jessie slough as being within the property which it then intended to appropriate, and that it cannot now condemn the same, or any rights therein. The map was made from the government field notes taken from the office of the surveyor general. These field notes do not, nor does the government survey, show the existence of the slough. The evidence shows that the slough was not meandered, and that the present physical location of the river itself does not exactly correspond with the government field notes and survey which have been made for more than fifty years. Bal. Code, § 4379 (P. C. § 7112), requires a boom company, within ninety days after its articles of incorporation have been filed, to file in the office of the secretary of state a plat or survey of so much of the shore lines of the waters of the state *and lands contiguous thereto* as are proposed to be appropriated, such plat to be made from the records in the United States surveyor general's office of this state, or by a competent surveyor subsequent to an actual survey. This plat was made from the records in the surveyor general's office. It not only shows the stream as meandered by the original field notes, but also shows the relators' and other lands contiguous thereto. If it be conceded that the slough is not a part of the river as meandered, and shown by the original government survey and field notes, it is as shown by the evidence actually within the lands of Lownsdale and wife, which are included in the plat and are therefore subject to condemnation.

The relators contend that, by these condemnation proceedings, as prosecuted, the respondent is endeavoring to entirely close the river from navigation, in violation of the statutes of the United States and the permit granted to respondent by the United States government, that the appropriation thus attempted should not be decreed by the courts of this state; and that any such judicial action would constitute an attempted grant of judicial authority to respondent, permitting

Jan. 1908]

Opinion Per CROW, J.

it to maintain a public nuisance in the navigable waters of the state. The evidence does not sustain this contention. It has been shown that the respondent by the extension of its boom now being made under permission of the United States government, will be enabled to, and will, keep open for navigation a channel fifty feet in width on the easterly side of the river, and that it is now seeking to appropriate property rights of the relators as above mentioned, to aid it in carrying out that purpose.

There is no merit in another suggestion made by the relators that the respondent cannot condemn because it did not, prior to the commencement of these proceedings, endeavor to obtain by purchase the rights and privileges it now seeks to appropriate. The evidence shows that such endeavors were made by respondent, but even though the contrary appeared, yet the position of the relators in this proceeding will not permit them to now present any such objection. *State ex rel. Skamania Boom Co. v. Superior Court*, 47 Wash. 166, 91 Pac. 637.

Relators further contend that the respondent is not seeking to condemn for a public use, but for a private purpose. They base this contention on the proposition that no logging is being done upon the stream except by a certain other corporation in which the stockholders are identical with those of the respondent corporation. The evidence does not sustain this contention, which in any event is without merit, as shown by the opinion in *State ex rel. Wilson v. Superior Court*, 47 Wash. 397, 92 Pac. 269, recently rendered by this court.

The relators further contend that no public necessity for the condemnation has been shown. Without discussing the evidence in detail, all of which we have carefully read and considered, we will state that it is amply sufficient to sustain the finding of the trial court that such public necessity does exist. The foregoing discussion substantially covers all controlling points presented by the relators. We will, however,

state that, having examined the entire record, together with all the assignments of error made and discussed in the briefs, we are unable to find that the trial court has committed any prejudicial error. The judgments are affirmed.

HADLEY, C. J., MOUNT, ROOT, FULLERTON, RUDKIN, and DUNBAR, JJ., concur.

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[No. 6852. Decided January 15, 1908.]

THE STATE OF WASHINGTON, *on the Relation of O. P. Burrows et al., Plaintiff*, v. THE SUPERIOR COURT FOR CHEHALIS COUNTY *et al., Respondents*.<sup>1</sup>

EMINENT DOMAIN—RIPARIAN RIGHTS—LOGS AND LOGGING—STATUTES—CONSTRUCTION. Under Bal. Code, § 4388, conferring upon boom companies the right to condemn "shore rights and other property upon the river," and § 4390 providing that it shall be unlawful to take "lands or sloughs" within territory of certain remonstrancers, a remonstrance does not affect the company's power to condemn a right to maintain splash dams some miles up the river above the lands of the remonstrancers, as none of their "lands or sloughs" are sought to be appropriated.

Certiorari to review an order of the superior court for Chehalis county, Linn, J., entered June 15, 1907, after a hearing on the merits, adjudging a public use and directing an assessment of damages in a condemnation proceeding. Affirmed.

*J. C. Cross, A. Emerson Cross, Bogle & Spooner, and J. W. Robinson*, for relators.

*Ben Sheeks and J. B. Bridges*, for respondents.

Crow, J.—On March 28, 1907, the Humptulips Driving Company, a corporation, instituted in the superior court of Chehalis county proceedings to condemn certain property rights of O. P. Burrows and Alice Burrows, his wife. After

<sup>1</sup>Reported in 93 Pac. 426.

the entry of a preliminary decree adjudging a public use, the defendants applied to this court for a writ of certiorari, and the writ having been issued, the decree is now before us for review.

The application herein was made to this court at the same time a like application was made in *State ex rel. Burrows v. Superior Court*, No. 6853, in which we have this day affirmed decrees of the superior court. [*Ante* p. 277, 93 Pac. 423.] Practically all assignments of error made in that proceeding are repeated here, and we will in this opinion only consider one point not then presented. The respondent the Humptulips Driving Company was organized under "An act to provide for the organization and incorporation of companies for clearing out and improving rivers and streams in this state, and for the purpose of driving, sorting, holding, and delivering logs and other timber products thereon," etc. Laws 1895, p. 128, ch. 72; Bal. Code, §§ 4387 to 4394 (P. C. §§ 7120-7127). In its petition the respondent alleged that, within the statutory time, it filed its plat as required by Bal. Code, § 4389, showing shore lines of waters of the Humptulips river in Chehalis county, and lands contiguous thereto, proposed to be appropriated; that it has erected, maintained, and is now operating in the Humptulips river and its tributaries, many miles above the lands of the relators, certain splash dams for creating artificial freshets to aid it in driving sawlogs and other timber products into a boom near the mouth of the river; that the relators own certain described tracts of land contiguous to and bordering upon the west banks of the Humptulips river; that it is at times necessary for respondent to create artificial freshets by means of its splash dams, and that it is also necessary for it to condemn and appropriate as against the relators the right to create such artificial freshets in so far as their private riparian rights may be affected, and also the right to drive sawlogs down the river by means of such artificial freshets. The respondent had been operating

upon the river for a number of years, when the relators instituted an equitable action against it and the Grays Harbor Boom Company to enjoin them from interfering with the relators' riparian rights, and secured an injunction decree which was affirmed by this court in *Burrows v. Grays Harbor Boom Co.*, 44 Wash. 630, 87 Pac. 937. Thereupon the respondent the Humptulips Driving Company instituted condemnation proceedings in which it now seeks to appropriate the right to create artificial freshets past the lands of the relators to the extent that such freshets may interfere with their riparian rights, and to drive sawlogs on such freshets, contending, however, that it does not intend to take or flood any of their contiguous lands.

The relators answered, alleging that the Humptulips river was and is affected by the tide for a distance of about three miles above its mouth, and past their lands; that within the time fixed by Bal. Code, § 4390 (P. C. § 7124), the relators and others being then owners of more than one-half of the lands lying alongside and abutting that portion of the Humptulips river affected by the tide, filed in the office of the auditor of Chehalis county, their written remonstrances against the respondent's contemplated improvement of that portion of the river affected by the tide; and that the respondent is therefore estopped from making the appropriation it now asks. The evidence shows that this remonstrance was signed by owners of more than one-half of the lands contiguous to that portion of the river affected by the tide, but that it was not signed by owners of one-half of the lands contiguous to the entire river, or to that portion of the river used by the respondent and which it has improved or now seeks to improve. The contention of the relators for an estoppel is based upon Bal. Code, § 4390, *supra*, reading as follows:

"Such corporation shall have power and is hereby authorized, in any of the rivers and streams of this state, or the dividing waters thereof, to remove jams, roots, snags and rocks,

improve and straighten the channel, build wing dams and sheer booms, construct dams with gates or otherwise for the purpose of storing water with which to produce artificial freshets, and in all ways to improve such streams and rivers for the purposes herein mentioned and contemplated: . . . .  
*Provided, however,* That whenever the owners of more than one-half the land lying alongside or abutting on any stream affected by the tide, proposed to be improved according to this act, shall file with the board of county commissioners of the county in which said river is situated a remonstrance against any improvements of so much of the stream as is affected by the tide, it shall then be unlawful for any corporation to take the land or any slough within the territory owned by any such remonstrancers: *Provided,* That such remonstrance shall be filed with said board within fifteen days from the filing of said plat."

The evidence shows that portions of the Humptulips river are about two hundred and fifty feet in width; that the respondent's splash dams are respectively fourteen, twenty-five, and thirty miles above the relators' lands; that the stream is floatable for logs during certain seasons of the year at times of natural freshets, and with the aid of artificial freshets at other times; and that there is a vast amount of tributary timber dependent upon its use for being carried to market. What effect do the remonstrances filed and pleaded have in this case? Must the statute be so construed as to hold that such remonstrances will prevent any condemnation of the right to create and use artificial freshets in the stream past relators' lands?

Bal. Code, § 4388 (P. C. § 7121), confers upon the respondent the right to acquire by condemnation if necessary, land, *shore rights or other property upon the river*. Section 4390, above quoted, provides that, when the remonstrances are legally made and filed, it shall be unlawful for the driving company to take *lands or sloughs* within territory owned by the remonstrancers. Construing these two sections of the same act together, it is evident that the legislature intended to dis-

tinguish lands and sloughs from shore rights and other property, and that while *lands or sloughs* may not be taken as against remonstrances, the statute does not make it unlawful to take *shore rights or other property* subject to appropriation. The respondent is not attempting to appropriate any land, but seeks only to interfere with the relators' riparian rights by creating artificial freshets in the river, thus interfering with the natural flow of the water, without flooding or taking their contiguous lands.

The respondent contends that under the statute, it is necessary for the remonstrances to be signed by the owners of more than one-half of all lands abutting the river above, as well as along that portion affected by the tide. While there is merit in this contention, we do not find it necessary to pass upon the same, for assuming without deciding that the remonstrances are sufficient, and that they need only be signed by the owners of one-half of the land abutting that portion of the river affected by the tide, yet the relators' plea of estoppel must fail, as the respondent is not appropriating any *land or slough* owned by them. The statutory authority to appropriate shore rights and other property of the relators is not affected by the remonstrances, and under that authority respondent now seeks and is entitled to condemn the right to create artificial freshets. No part of relators' lands will be taken, and it is not contended that the driving company is attempting to violate the statute by taking any slough.

The judgment is affirmed.

HADLEY, C. J., MOUNT, ROOT, FULLERTON, RUDKIN, and DUNBAR, JJ., concur.

Jan. 1908]

Opinion Per CROW, J.

[No. 6896. Decided January 15, 1908.]

THE STATE OF WASHINGTON, *on the Relation of E. G.  
Thompson, Appellant*, v. STATE BOARD OF DENTAL  
EXAMINERS *et al.*, Respondents.<sup>1</sup>

PHYSICIANS AND SURGEONS—DENTISTRY—PRACTICE—REGULATIONS—CONSTITUTIONAL LAW. The statutory requirement that an applicant for a license to practice dentistry shall present a diploma from a dental college in good standing, before taking his examination, is not so unreasonable or arbitrary as to infringe any constitutional right.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 11, 1907, upon sustaining a demurrer to an application for a writ of mandamus, dismissing an action to compel the examination of an applicant to practice dentistry. Affirmed.

*John R. Parker and Edwin J. Brown*, for relator.

*Walter M. Harvey*, for respondents.

Crow, J.—E. G. Thompson as relator made application to the superior court of King county for a writ of mandamus to compel W. A. Fishburn, C. S. Irwin, F. R. Fisk, H. B. Brand, and E. B. Edgars, the state board of dental examiners, to examine him touching his qualifications to practice dentistry in the state of Washington, and to further compel such board to issue to him a license to practice dentistry in the event that he successfully passes such examination. The defendants interposed a demurrer to his affidavit, which was sustained by the trial court. Thereupon the relator declined to plead further, and an order of dismissal was entered, from which he has appealed.

It is not necessary to state the allegations of the affidavit upon which the appellant based his application for the writ,

<sup>1</sup>Reported in 93 Pac. 515.

as the only defect sought to be reached by the demurrer was appellant's failure to allege that when he filed his application, paid his fee, and presented himself for examination, he also presented to the respondents his diploma from some dental college in good standing, with satisfactory evidence of his rightful possession of the same. It is not contended by the respondents that appellant's affidavit is defective for the want of any other allegation, and for the purposes of this case it is conceded that he has no such diploma. § Bal. Code, § 3025 (P. C. § 4467), provides that:

"Any person or persons seeking to practice dentistry in the state of Washington . . . after the passage of this act shall file his or her name, together with an application for examination, with the secretary of the state board of dental examiners, and at the time of making such application shall pay to the secretary of the board a fee of twenty-five dollars, and to present him or herself at the first regular meeting thereafter of said board to undergo examination before that body. No person shall be eligible for such an examination unless he or she shall be of good moral character and shall present to said board his or her diploma from some dental college in good standing, and shall give satisfactory evidence of his or her rightful possession of the same. . . ."

The appellant's only contention is that the provision of the above section requiring him to present his diploma as a condition precedent to taking the examination is unconstitutional and void. He has alleged that he has sufficient skill, learning, and experience to enable him to pass any reasonable or proper examination and fit him for the practice of dentistry. He does not question the right of the state to regulate the practice of dentistry and thereby protect the public from ignorant and incompetent persons who may wrongfully and fraudulently announce themselves as qualified and skillful practitioners. In fact he substantially concedes that the legislature may, by reasonable enactments, provide appropriate regulations under which only such persons as are competent may be authorized to practice.

Jan. 1908]

Opinion Per CROW, J.

Appellant's apparent position is that, while a valid statute might be enacted requiring him to either pass an examination or present a diploma from some dental college in good standing, it cannot compel him to do both without invading his constitutional rights. In other words, he contends that, if he has, as admitted by the demurrer, sufficient skill and knowledge to fit him for the practice, and is able and willing to pass the examination, he cannot also be required to present a diploma to the board as a condition precedent to being permitted to take such examination. The statute makes the same requirements of all applicants for examination. No favored or preferred classes are created or recognized. An applicant who holds a diploma must also pass the examination. Rightful possession of his diploma does not of itself authorize him to practice, or entitle him to a license. The requirement for both diploma and examination as a test of knowledge and skill is not such an unreasonable or arbitrary one as to invalidate the statute. The right to determine what requirements must be met by an applicant is within the exclusive province of the legislature. This statute was considered in the case of *In re Thompson*, 36 Wash. 377, 78 Pac. 899, in which it was attacked as unconstitutional and sustained by this court. Without further discussion, we now adhere to the ruling then made. The appellant contends that case is not in point on the question now presented, but we fail to see any substantial distinction in the principles involved.

The judgment is affirmed.

HADLEY, C. J., ROOT, FULLERTON, and MOUNT, JJ., concur.

[No. 6964. Decided January 15, 1908.]

PEARL TERGESON, *by His Guardian Ad Litem, Soren  
Tergeson, Respondent*, v. ROBINSON MANUFACTURING  
COMPANY, *Appellant*.<sup>1</sup>

MASTER AND SERVANT—NEGLIGENCE—GUARDING DANGEROUS MACHINERY—QUESTIONS FOR JURY. The questions of negligence in failing to properly guard dangerous machinery, and whether it was the proximate cause of the accident, are for the jury where the evidence was conflicting and the plaintiff showed that an originally proper guard on a planer was out of repair, and so worn that upon being struck instead of remaining firm it would move against the knives, and carried plaintiff's hand against the same.

SAME—CONTRIBUTORY NEGLIGENCE—OPERATION OF MACHINERY—YOUTHFUL EMPLOYEE. A minor, of limited experience in running a planer, cannot be said to be guilty of contributory negligence, as a matter of law, in attempting to remove a broken piece of lattice from a planer without stopping the machine, where there was evidence that he did not realize the danger, that such realization could come only from experience, and that he had not been instructed as to the same, when it was the master's duty to give such instructions.

APPEAL—RECORD—TRANSCRIPT. An instruction requested in writing and filed with the clerk is properly made part of the record on appeal without being included in the bill of exceptions or statement of facts.

TRIAL—QUESTIONS FOR JURY—WITHDRAWAL OF ISSUE. Where there was no evidence to support an allegation that the insufficiency of a belt shifter was a proximate cause of the accident, it is reversible error to submit the issue to the jury and to refuse a requested instruction withdrawing the same.

Appeal from a judgment of the superior court for Snohomish county, Honorable J. A. Coleman, judge *pro tempore*, entered March 23, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee while operating a planing machine. Reversed.

<sup>1</sup>Reported in 93 Pac. 428.

Jan. 1908]

Opinion Per CROW, J.

*Cooley & Horan*, for appellant.*Frank C. Park and Wilshire & Kenaga*, for respondent.

Crow, J.—This action which has heretofore been in this court (43 Wash. 298, 86 Pac. 578) was commenced by Pearl Tergeson, by Soren Tergeson, his guardian *ad litem*, against Robinson Manufacturing Company, a corporation, to recover damages for personal injuries. From a judgment in plaintiff's favor, the defendant has appealed.

The respondent, an employee of appellant, was injured on March 2, 1905, while running lattice through a sticker or planing machine, which machine was provided with top, bottom, and side-heads, equipped with knives. The lattice material was passed through feed rolls to the lower and upper knives, and thence out of the machine to the rear. A long pole was provided as a belt shifter. It was placed on top of the machine, one end being within easy reach of the operator and the other end resting in a notch to the rear of the belt and counter shaft. In this position it served to retain the belt on the fixed pulley. Near the center of the machine the pole rested between a set-screw and an iron casting which served as a fulcrum when shifting the belt. To stop the machine the operator pulled down the front end of the pole to raise the further end from the notch, drew the pole towards him, pushed it back on the opposite side of the belt, and then, by using the pole as a lever, shifted the belt on to a movable pulley. To start the machine this method was reversed. The heads and knives were located near the center of the machine to the rear of the feed rolls. An iron hood, which could be raised and lowered, was located immediately over the upper head to safeguard the knives. The respondent had on previous occasions fed larger material into this same machine, but his regular employment was to feed mouldings into a smaller machine.

About closing time on the evening preceding the accident, appellant's foreman ordered the respondent to feed lattice

material into the larger machine. He did so and continued the same work about one hour the next morning. The lattice material was cross-grained which caused one piece to break. This broken piece passed the feed rolls and lower head, but clogged the top head and extended about ten inches to the rear above a pressure bar. Respondent stopped the feed rolls and, without shutting down the machine, attempted to remove the broken lattice by pulling it towards the rear, when it was caught by the top head and drawn back so forcibly and quickly as to carry his hand against the knives. The respondent alleged that the appellant was guilty of negligence, (1) in failing to provide a proper belt shifter; (2) in permitting the hood to become old, battered, and out of repair, so that it did not properly perform the functions of a guard; and (3) in failing to properly instruct respondent, an inexperienced minor, as to the duties and dangers incident to his work. The appellant pleaded assumption of risk and contributory negligence.

Appellant, by its several assignments, in substance contends that the trial court erred (1) in denying its motion for judgment *non obstante veredicto*, and (2) in refusing to give instructions requested. In support of the first contention it insists that no failure to instruct respondent or warn him of dangers was shown, sufficient to constitute negligence. We have read the entire record and conclude that the evidence on this issue was so conflicting as to necessitate its submission to the jury.

Appellant further contends that no liability on its part was shown arising out of any alleged defect in the hood, and that it affirmatively appears that such pretended defect was not a proximate cause of the accident. While it was conceded by the respondent that the hood as originally constructed was a proper safeguard, it was contended by him, and he produced evidence tending to show, that it had been permitted to become out of repair; that it was battered and worn to such an

Jan. 1908]

Opinion Per Crow, J.

extent that instead of remaining in a firm and fixed position when lowered over the top head, it would, on being struck, move against the knives; that when struck by appellant's hand it did so move; that instead of being a guard it permitted his hand to be carried against the knives, and that no such result would have occurred had it been in good repair. The evidence on this issue was in such direct conflict that it was for the jury to determine whether the hood had become an insufficient guard, whether it was by reason of want of repair a proximate cause of the accident, and whether the appellant was guilty of negligence in permitting it to remain and be used in such condition.

Appellant further contends that the evidence conclusively shows the respondent was guilty of contributory negligence in attempting to remove the broken piece of lattice without stopping the knives. There was evidence tending to show that respondent, although a minor, had a limited experience on this and other machines, and he testified that he knew he could not have been hurt had he stopped the machine. Yet there was evidence tending to show that he did not realize the danger of removing the lattice without stopping the machine, that he did not know it would run back into the knives instead of passing on towards the rear, that such knowledge would only come with experience, that lattice material when cross-grained was more liable to break than heavier material such as flooring or ceiling, that he had not previously run any lattice into this or any other machine, and that he had not been instructed by the appellant or any other person as to the danger to which he subjected himself in attempting to remove the lattice without stopping the machine. If respondent had been an experienced employee of mature years, he might possibly, under the evidence before us, be held guilty of contributory negligence as a matter of law; but in view of his youth, the surrounding circumstances, and the conflicting evidence, it became in this case a question of fact for the

jury to determine whether he did realize, or ought to have realized, the danger to which he was subjected, and was guilty of contributory negligence. Upon the evidence before us we cannot hold him guilty of contributory negligence as a matter of law. *Kirby v. Wheeler Osgood Co.*, 42 Wash. 610, 85 Pac. 62. It was appellant's duty to properly instruct and warn respondent. This it contends was done, not only by its foreman but also by respondent's father. Appellant's alleged failure to perform this duty would be negligence. The evidence on this issue was conflicting, and properly submitted to the jury.

The appellant in writing requested an instruction withdrawing from the jury all evidence as to the defective condition of the hood, contending that such alleged defective condition had nothing whatever to do with the accident, and was not a proximate cause thereof. Under the issues and the evidence above discussed, this instruction was properly refused, and the assignment of error which appellant has predicated on such refusal cannot be sustained.

Appellant in writing requested the trial court to instruct the jury as follows:

"You are instructed that one of the grounds of negligence charged by the plaintiff herein against the defendant, is that said defendant maintained a machine upon which plaintiff was injured, without any proper belt shifter for starting and stopping such machine. Upon this branch of the case you are instructed that there is no evidence showing or tending to show that plaintiff received his injury as the approximate result of a failure on the part of defendant to maintain a proper belt shifter. You are, therefore, instructed that it is immaterial in determining this case whether the belt shifter maintained upon this machine was or was not a proper shifter, and you will not take that matter into consideration in arriving at your verdict."

Appellant now contends that the trial court erred in refusing this instruction. The respondent has moved to strike appellant's requested instructions from the transcript for the

Jan. 1908]

Opinion Per CROW, J.

reason that they have not been made a part of the record by being included in any statement of facts. He contends that instructions, whether requested or given, must for the purpose of predicated error thereon be brought to this court in a statement of facts, and not in any other manner. The transcript shows that a written request setting forth the instructions desired was made by appellant and filed with the clerk. The statement of facts shows the instructions actually given, and appellant's exceptions to those given and refused. An instruction formally requested in writing and filed with the clerk is a part of the record. Bal. Code, § 5064 (P. C. § 681). The motion to strike is denied. The refusal of the trial court to give the requested instruction last mentioned constituted prejudicial error.

There is an utter absence of evidence showing, or tending to show, that the alleged insufficiency of the belt shifter was a proximate cause of the accident, or that it had anything whatever to do with it. If respondent had been injured while attempting to use the appliance provided, then the question of its sufficiency or insufficiency would have been an issue in this case to be submitted to the jury. We are utterly unable to understand how the character of the appliance became material. The respondent testified that he had repeatedly used it as a belt shifter, with complete success. True, he said that by reason of certain conditions, the pole sometimes had a tendency to strike him on the breast, but he further testified that he received no injury, and substantially admitted that it was not at all dangerous. It affirmatively appeared that neither he nor any other of appellant's employees complained of its insufficiency. He made no attempt to use the belt shifter at the time of the accident, although he could have successfully stopped the machine by its use had he desired to do so.

At respondent's request the trial court did in substance instruct the jury that, if they should find from the evidence

that the appellant did not provide and maintain in use proper belt shifters or other mechanical contrivances for throwing the belts on and off the pulleys which operated the machine, and that the failure so to do caused the injury complained of, such failure constituted negligence upon the part of appellant. This instruction does not cure the error above mentioned, as it submits an issue not authorized by the evidence tending to confuse the jury. Had the jury, in answer to special interrogatories, found (1) that the appellant had not failed to properly instruct or warn the respondent, (2) that it had performed its duty in furnishing a proper safeguard for the top head of the machine, but (3) that the belt shifter was not a proper appliance for the purpose for which it was intended, a general verdict for respondent, upon the evidence before us, would not be permitted to stand. Yet we are unable to say that the jury did not reach its verdict in this manner. For aught that appears the general verdict may have been based solely upon the alleged defective character of the belt shifter, notwithstanding the fact that it had absolutely nothing to do with the accident and was not the proximate cause of the injury sustained.

Having carefully considered all the contentions made by the appellant, we conclude that no prejudicial error was committed by the trial court in any instance other than the one above mentioned in refusing appellant's requested instruction as to the belt shifter, for which error the judgment is reversed, and the cause remanded for a new trial.

HADLEY, C. J., FULLERTON, RUDKIN, and DUNBAR, JJ., concur.

MOUNT and ROOT, JJ., took no part.

Jan. 1908]

Opinion Per Curiam.,

[No. 7042. Decided January 17, 1908.]

G. H. STILES, *Appellant*, v. J. M. SIMPSON *et al.*,  
*Respondents*.<sup>1</sup>

CONTRACTS — ASSENT — FRAUD — EVIDENCE — SUFFICIENCY. A contract of employment should not be set aside, one year after it was made, on the ground that it was induced by false representations, where the plaintiff was a competent business man of varied experience, no fiduciary relations existed between the parties, and no undue influence was used to induce the contract, but the venture simply did not prove as profitable as expected, and the plaintiff's property sold to the defendant had increased in value.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered April 4, 1907, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

*J. P. Perkins* and *Hamblen, Lund & Gilbert*, for appellant.  
*Horace Kimball* and *Belt & Powell*, for respondents.

PER CURIAM.—The appellant and respondent J. M. Simpson entered into a contract, in the month of November, 1904, by which appellant, for a stipulated consideration, was admitted to the office of the respondent as a student, with certain duties to perform, and under the terms of which he was to receive certain compensation. It is not necessary to reproduce the long contract here. After remaining in the office for nearly a year under the terms of the contract, the appellant brought this action to obtain relief from an alleged fraud, alleged to have been practiced upon him by respondent by means of false representations by which he, appellant, was induced to enter into the contract. The case was placed at issue by answer and reply, and was tried before a judge without a jury. Upon the conclusion of the testimony, the court

<sup>1</sup>Reported in 93 Pac. 1135.

announced that he was of the opinion that plaintiff had failed to prove the allegations of his complaint, and had failed to prove or show that defendant was guilty of any fraud, misrepresentation, or overreaching in the matter of the contract and transactions between plaintiff and defendant, or that plaintiff was entitled to any relief whatever. The action was dismissed. From the judgment dismissing the case, this appeal is taken.

A careful perusal of all the testimony convinces us that the conclusion by the trial judge was entirely justified. The appellant was in the prime of life, a man of education and varied experience, and was in reality what might be termed a trading man, and there were no fiduciary relations existing between him and the respondent, and it does not appear that any undue influence whatever was brought to bear upon him to induce him to execute the contract, or for that matter that it was an unconscionable contract. About all that can be said was that the venture did not prove as profitable as he had hoped, while on the other hand, the property which he had sold to respondent had increased in value beyond his calculations.

Without any extensive analysis of the testimony, we are satisfied that the appellant signally failed to establish the material allegations of his complaint, and the judgment of the trial court is affirmed.

Jan<sup>r</sup> 1908]

Opinion Per Root, J.

[No. 7039. Decided January 17, 1908.]

**M. L. BALDWIN, Respondent, v. J. W. BROWN, Appellant.<sup>1</sup>**

**VENDOR AND PURCHASER—CONTRACT TO CONVEY—CONSTRUCTION—PERFORMANCE—SHORTAGE OF LAND—DEDUCTION IN PRICE.** Where the vendor agrees to convey by a special warranty deed, and "reserves the right and title" until all payments are made, the vendee is entitled to a deduction for failure of title as to a portion of the tract, as the contract to "convey" is not fulfilled by a special warranty deed of land not owned by the vendor (CROW and DUNBAR, JJ., dissenting).

**SAME—DEDUCTION IN PRICE—AMOUNT.** Where the vendor is unable to convey an aliquot part of the land, the vendee is entitled to a deduction from the purchase price in the proportion that the value of such part bears to the whole tract.

Appeal from a judgment of the superior court for King county, Griffin, J., entered May 25, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to compel specific performance of a contract to convey land. Affirmed.

*Steele & Brown*, for appellant.

*Buck & Boddy*, for respondent.

Root, J.—This is an action in equity by respondent to compel appellant to make a conveyance of certain land. From a decree in plaintiff's favor defendant appeals.

Appellant and one David Farmer, on the 18th of May, 1904, entered into a written agreement of which the following is the material portion:

"That in consideration of eleven hundred dollars (\$1100) paid, and to be paid, by said David Farmer, his heirs and assigns, to J. W. Brown, his heirs and assigns, as hereinafter stated, the said J. W. Brown agrees to convey to the said David Farmer the north half ( $\frac{1}{2}$ ) of the northeast quarter ( $\frac{1}{4}$ ) of section one (1) township twenty-two (22)

<sup>1</sup>Reported in 93 Pac. 413.

announced that he was of the opinion that plaintiff had failed to prove the allegations of his complaint, and had failed to prove or show that defendant was guilty of any fraud, misrepresentation, or overreaching in the matter of the contract and transactions between plaintiff and defendant, or that plaintiff was entitled to any relief whatever. The action was dismissed. From the judgment dismissing the case, this appeal is taken.

A careful perusal of all the testimony convinces us that the conclusion by the trial judge was entirely justified. The appellant was in the prime of life, a man of education and varied experience, and was in reality what might be termed a trading man, and there were no fiduciary relations existing between him and the respondent, and it does not appear that any undue influence whatever was brought to bear upon him to induce him to execute the contract, or for that matter that it was an unconscionable contract. About all that can be said was that the venture did not prove as profitable as he had hoped, while on the other hand, the property which he had sold to respondent had increased in value beyond his calculations.

Without any extensive analysis of the testimony, we are satisfied that the appellant signally failed to establish the material allegations of his complaint, and the judgment of the trial court is affirmed.

Jan. 1908]

Opinion Per Root, J.

[No. 7039. Decided January 17, 1908.]

**M. L. BALDWIN, Respondent, v. J. W. BROWN, Appellant.<sup>1</sup>**

**VENDOR AND PURCHASER—CONTRACT TO CONVEY—CONSTRUCTION—PERFORMANCE—SHORTAGE OF LAND—DEDUCTION IN PRICE.** Where the vendor agrees to convey by a special warranty deed, and "reserves the right and title" until all payments are made, the vendee is entitled to a deduction for failure of title as to a portion of the tract, as the contract to "convey" is not fulfilled by a special warranty deed of land not owned by the vendor (CROW and DUNBAR, JJ., dissenting).

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<sup>1</sup>Reported in 93 Pac. 413.

range two (2) east, King county, Washington, by special warranty deed at the time the same is fully paid for as per this agreement;

"That one hundred dollars (\$100) of said sum is in hand paid and one hundred sixty dollars (\$160) of the same is due and payable Nov. 1, 1904, and the balance, eight hundred and forty (\$840) dollars is due and payable Nov. 1, 1905, as per the two promissory notes of even date herewith, bearing seven (7) per cent interest from date;

"The said David Farmer is to keep all taxes assessed against said real estate paid before the same become delinquent;

"That the said J. W. Brown reserves the right and title to said land until the same is paid for in full."

The property described in said contract had been obtained by King county in 1902, by general foreclosure for taxes for 1895 and prior years. The appellant received a deed to the same from the county, July 15, 1903. Some time after making the contract above referred to, David Farmer died, and his interests therein became vested in this respondent, who is his mother. Before the final payment became due, one William Cross brought an action in equity to quiet title to five acres of the land described in said contract, and made this appellant and respondent parties. Said action was prosecuted to final judgment, resulting in a decree to the effect that this appellant had no right, title, or interest in or to said five acres of land, but that the same was the property of said William Cross. When the time for making final payment under the terms of the above contract arrived, respondent requested a reduction in the amount of the purchase price on account of not getting said five acres. Appellant declined to make such reduction, but insisted upon respondent's paying the full amount called for by the contract. Thereupon this action was instituted to compel appellant to convey the balance of the land without respondent's paying the proportion of the purchase price represented by said five acres.

Appellant contends, first, that the trial court was wrong in the construction placed upon the contract; and second, that

Jan. 1908]

Opinion Per Root, J.

the amount of reduction directed to be allowed, if any was allowable, was too great. As to the first point, appellant urges that, as a special warranty deed warrants only against defects of title occasioned by the act of the grantor himself, and as Cross recovered this property not by reason of anything done or omitted by appellant but by reason of matters occurring before he obtained the property from the county, he (appellant) was entitled to receive from respondent the full amount of the purchase price as called for by the contract for the entire tract. As the controversy is not as to the effect of a special warranty deed, but as to a contract to "convey" by special warranty deed, and as the contract contains the expression "that the said J. W. Brown reserves the right and title to said land until the same is paid for in full," the respondent claims, and apparently the trial court was of the opinion, that appellant by said contract purported to have "right and title" to said land, and agreed to "convey" the same, and that the contract contemplated this, and that as a court of competent jurisdiction, prior to the final payment on this contract, had decided that appellant had no right or title whatever to said five acres, he was therefore unable to "convey" by a special warranty deed, or by any other form of conveyance. The court, therefore, held that the appellant was not in a position to require respondent to pay for that which the former had agreed to, but could not, convey. We think this position must be maintained.

In *Ankeny v. Clark*, 1 Wash. 549, 20 Pac. 583, the territorial supreme court, speaking through Chief Justice Burke, said:

"No form of deed is sufficient to convey a title where the grantor has none."

It is not a question here of the effect of a special warranty deed heretofore delivered, but it is a question of whether or not a party is able to carry out the terms of a contract to be performed by him.

As to the second point, it appears that the five acres to which the title failed was of greater value per acre than the remaining portion of the tract. The court found the value of this five-acre tract was \$250, and directed that an allowance of that amount should be made to respondent. Appellant claims that this is excessive and disproportionate. Where one is unable to convey an aliquot part of the land agreed to be conveyed, the rule seems to be that such a proportion of the total purchase price shall be deducted as the value of such portion bore to the value of the entire tract at the time of the purchase. Appellant urges that this was not done in this case, but in this we think he is in error; at least, it does not appear that any other rule of ascertainment was adopted. It is urged that an error to the extent of a few dollars was made in the computation. If so, it can be credited in adjusting the costs.

Certain other errors are assigned, but become immaterial under our view of the two questions hereinbefore considered.

The judgment of the trial court is affirmed.

HADLEY, C. J., FULLERTON, and MOUNT, JJ., concur.

CROW, J. (dissenting).—The substantial effect of the majority opinion is to compel appellant to perform his contract in the identical manner which would have been required of him had he agreed to warrant a title previously acquired and convey the same by a general warranty deed. He made no such agreement. His contract calls for a special warranty deed only. Both he and respondent's predecessor knew that his sole title, which appellant was selling, rested on a tax foreclosure. Appellant acquired such title without warranty, and his evident purpose, known to respondent's predecessor, was to convey the same as it came to him; that is, to sell whatever had come to him by the tax title, and to enter into no covenant to hold him liable beyond that. He has fully performed his

Jan. 1908]

Opinion Per FULLERTON, J.

agreement, but the majority opinion now makes a new contract for him and orders its specific performance.

The judgment should be reversed, and I therefore dissent.

DUNBAR, J., concurs with CROW, J.

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[No. 7035. Decided January 17, 1908.]

THE STATE OF WASHINGTON, *Respondent*, v. EDNA SERIGHT,  
*Appellant*.<sup>1</sup>

INDICTMENT AND INFORMATION—TIME FOR FILING—DISMISSAL FOR DELAY—TIME FOR MOTION. Under the statute requiring the dismissal of a criminal prosecution if an indictment is not found or information filed within thirty days after the holding of the person, the motion for dismissal must be made at the time the accused is called to plead; since such dismissal is not a bar to another prosecution, and the objection is waived by pleading and going to trial.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered March 22, 1907, upon a trial and conviction of aiding and assisting in the crime of rape. Affirmed.

*Nuzum & Nuzum*, for appellant.

*R. M. Barnhart*, and *A. J. Laughon*, for respondent.

FULLERTON, J.—The appellant was informed against, tried and convicted for aiding and assisting one John Grim in the commission of the crime of rape. From the sentence pronounced against her, she appeals. It appears that the appellant was first arrested on October 17, 1906, on a warrant issued by a committing magistrate. An examination was held on the charge on October 17, 1906, at which time the magistrate found that there was reasonable cause to believe her guilty of the crime charged, and bound her over to answer to the superior court of Spokane county whenever the same

<sup>1</sup>Reported in 93 Pac. 521.

should be prosecuted, ordering her to enter into a recognizance with sufficient sureties for her appearance therein in a penal sum named and stand committed until such recognizance was furnished. She did not enter into the recognizance and was committed to the county jail. An information was filed against her in the superior court on January 5, 1906. At that time she was brought before the court, arraigned on the information, and asked if she was ready to plead thereto. Thereupon she pleaded not guilty, and the cause was set down to be tried on January 14, 1907. On that day the court continued the cause until January 17, 1907. On January 17, she filed a motion asking that the cause be dismissed because the information was not filed against her within thirty days after she had been held to answer. The motion was denied, whereupon a trial was had with the result before stated. The ruling of the court on the motion to dismiss constitutes the only error assigned on this appeal.

The statute relating to persons held to answer to a criminal charge provides that if an indictment be not found or an information filed against a person so held within thirty days after the time the order holding the person is made, "the court must order the prosecution dismissed, unless good cause to the contrary be shown."

It is the appellant's contention that the failure to find an indictment or file an information within the time prescribed subjects the prosecution to a dismissal whenever a motion is made therefor, no matter at what stage of the case or what proceeding may have intervened between the filing of the indictment or information and the time of the notice, unless the state, at the time the motion is made, shows good cause for the delay. But we think this not the true meaning of the statute. Unquestionably, a person bound over to answer to a criminal charge may, after thirty days from that time, have the proceedings dismissed on motion if no indictment is found or information filed against him, unless good cause

Jan. 1908]

Opinion Per FULLERTON, J.

for the delay be shown, and this right continues until the actual finding of the indictment or filing of the information, and it may be that the right exists when the defendant is called upon to plead to an indictment found or information filed after the thirty days, but the right is waived if not exercised before or at the time he is so called upon to plead. This follows from the nature and purpose of the statute itself. It is manifest that its sole purpose was to procure for the accused a speedy trial; to enable him to compel the prosecuting officer to proceed against him within the time fixed or else dismiss the proceedings brought against him.

But a dismissal under such circumstances does not operate as a bar to another prosecution for the same offense, nor would a discharge compel the prosecuting officer to commence anew before a committing magistrate. On the contrary, the prosecuting attorney may file such an information in the court before which he was bound over to appear, at once upon the dismissal of the original proceeding, without violating any of the accused's rights. There would be little reason then in holding the statute mandatory in the sense that the original lapse entitled the defendant to a dismissal at any stage of the proceedings he might ask for it. If he can exercise the right just before the trial, so he may during the trial, and after a verdict of the jury finding him guilty. This would be to give the statute an effect directly opposite to that the legislature intended it should have, it would make it a means of delaying the final disposition of the case when it was intended to hasten that event.

The motion therefore came too late, and the court did not err in refusing to grant it.

The judgment is affirmed.

HADLEY, C. J., RUDKIN, MOUNT, CROW, ROOT, and DUNBAR, JJ., concur.

[No. 7018. Decided January 17, 1908.]

PETER GENNELLE, *Appellant*, v. ALPHONSE BOULAIS *et al.*,  
*Respondents*.<sup>1</sup>

SALES—CONDITIONAL SALES—PERFORMANCE—RESCISSION BY VENDOR—DEFAULT IN PAYMENT—EXCUSES—FAILURE OF VENDOR'S TITLE. The vendor of chattels under a conditional sale cannot rescind the contract or recover possession on account of the vendee's default in making payments, where the default was due to the vendor's inability and refusal to convey a perfect title, and tender of the amount due was made on condition of receiving an unencumbered title to the property purchased.

Appeal from a judgment of the superior court for Ferry county, Carey, J., entered January 6, 1907, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to recover possession of personal property. Affirmed.

*W. T. Beck* and *Alfred M. Craven*, for appellant.

*G. V. Alexander* and *C. P. Bennett*, for respondents.

RUDKIN, J.—On the 19th day of April, 1905, a conditional sale agreement of the personal property now in controversy was entered into between one Lucile Ries and the defendant Boulais. The memorandum of sale recited that the property should remain the absolute property of the vendor until after the full and complete payment of the purchase price of \$2,500; that the purchase price should be paid as follows: \$200 in cash, the receipt of which was acknowledged, \$300 on June 15, 1905, \$500 on August 15, 1905, \$500 on Oct. 15, 1905, \$500 on Dec. 15, 1905, and \$500 on February 15, 1906; that the deferred payments were evidenced by promissory notes of even date, bearing interest at the rate of six per cent per annum from date until paid; that the property

<sup>1</sup>Reported in 93 Pac. 421.

Jan. 1908]

Opinion Per RUDKIN, J.

should be at the risk of the vendee while in his possession, and that loss thereof or damage thereto should not extinguish or diminish liability on the notes given for the purchase price; that the property should be kept insured in a sufficient sum to save the vendor harmless, if possible; that possession was given on the date of sale; that in case default were made in the payment of the purchase money notes, or either of them, principal or interest, as the same became due, the vendor was empowered to take possession of the property, with or without process of law, and that the contract should be forfeited and determined at the election of the vendor, and all sums theretofore paid by the vendee should be retained by the vendor as rental for the use of the property.

On the 30th day of April, 1904, one William Graham filed a lien against the mill property described in the above memorandum of conditional sale, for the sum of \$385.13, and on the 31st day of May, 1904, an action was commenced in the superior court of Ferry county against the vendor, Lucile Ries, and one E. A. Gardner, to foreclose said lien, which action was still pending at the time of the commencement of this action. The purchaser Boulais had no actual notice of the lien claim or of the pendency of the foreclosure action until after the conditional sale contract was entered into. The purchase money notes were all paid except the two notes for \$500 each, maturing on the 15th day of December, 1905, and the 15th day of February, 1906, respectively. On the 3d day of May, 1906, demand was made for payment of these two notes but payment was refused, except conditionally. On the same day Ries transferred the property by bill of sale to the plaintiff Gennelle, and the present action was instituted to recover possession of the property.

The only controverted fact in the case is whether an extension of time was given within which to make payment of the last two notes to mature, the respondent contending that the time for the payment of the note maturing December

15, 1905, was extended until February 15, 1906, and that the time for payment of the note maturing February 15, 1906, was extended until May, 1906, the appellant contending that no such extension was granted. For reasons to be presently stated the question of extension is not very material.

In April, 1905, all the purchase money notes were left with the British-American Trust Company of Grand Forks for collection. During the month of February, 1906, the respondent Boulais paid the amount of the note maturing December 15, 1905, to the Trust Company, with instructions to pay the same over to the payee upon receiving a deposit of a transfer of a clear title to the mill property, which would include a release or satisfaction of the Graham lien. On the 11th day of May, 1906, the amount of the last note was paid to the clerk of the superior court of Ferry county under like conditions and stipulations. It clearly appears from all the testimony that the respondents were ready and willing to make full payment of the purchase price long prior to the commencement of this action, provided the vendor would convey a clear title and procure a release or satisfaction of the Graham lien, but not otherwise. If, therefore, the respondents had a right to insist upon a release or satisfaction of this lien before making final payment, they were not in default at the time of the commencement of this action. But if they had no such right they manifestly were in default, whether an extension of time for payment had been granted or not, for the first note was more than two months overdue and no payment had been made or tendered except conditionally. The question to be decided, therefore, resolves itself into this: Can a purchaser under a conditional contract of sale retain possession of the property and defend an action for possession on the ground that the title of his vendor is defective or encumbered? The appellant rests his case on the broad principle that a bailee, a tenant, or a purchaser will not be permitted to deny the title of his bailor, landlord, or vendor in

Jan. 1908]

Opinion Per RUDKIN, J.

an action to recover possession of the property bailed, leased or sold. Within certain limits this rule is well established, but we do not think that it is applicable or controlling here.

It fairly appears from the record that the appellant's vendor did not have what is termed a marketable title at the time a demand for the purchase price was made or at the time of the commencement of this action, and this fact does not seem to be controverted, and we cannot lend our sanction to a rule of law which will permit a vendor to maintain an action of this kind while himself in default and when his default is the direct and proximate cause of the default on the part of the purchaser. A purchaser of personal property may maintain an action against his vendor for breach of warranty of title without returning or offering to return the property, or he may recoup his damages in an action for the purchase price. A purchaser of real property in possession may recoup his damages in the same manner in an action for the purchase price, or he may maintain an action for specific performance and obtain a reduction or abatement of the purchase price commensurate with any encumbrance on the property. We do not think that a vendee in possession of personal property should be deprived of these rights by a mere change in the form of action. In other words, we do not think that a vendor can tender an encumbered or doubtful title and demand full payment of the purchase price, thus driving the purchaser to his action to recover the purchase money paid, or to an action for damages for breach of warranty. The appellant concedes that the same rule applies to both real and personal property, and in *Stein v. Waddell*, 37 Wash. 634, 80 Pac. 184, this court held that a vendor in default could not maintain an action for the rescission of a contract for the sale of real property. The rule there announced is fully sustained by the authorities. *Dennis v. Strassburger*, 89 Cal. 583, 26 Pac. 1070. Whatever other remedy the appellant might have, the court below correctly ruled that he could not recover

possession of the property for a default on the part of the purchaser caused directly and primarily by the default of his own vendor.

The judgment of the court below is therefore affirmed.

HADLEY, C. J., FULLERTON, CROW, ROOT, and DUNBAR, JJ., concur.

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[No. 6992. Decided January 17, 1908.]

THOMAS MCCART, *Appellant*, v. RACINE WOOLEN MILLS,  
BLAKE & COMPANY, *Respondent*.<sup>1</sup>

APPEAL — RECORD — BILL OF EXCEPTIONS — AFFIDAVITS. Affidavits used upon a hearing to quash a service of summons must be brought up on appeal by bill of exceptions or statement of facts, or appeal from the order will be dismissed.

Appeal from an order of the superior court for Spokane county, Poindexter, J., entered December 22, 1906, quashing a service of summons. Appeal dismissed.

*S. P. Domer*, for appellant.

*Henley & Kellam*, for respondent.

PER CURIAM.—This is an appeal from an order quashing the service of summons. The notice to quash was heard on affidavits which accompanied the motion, affidavits in answer thereto, and affidavits in reply to the answering affidavits. The respondent moves to dismiss the appeal. The motion must be granted. This court has repeatedly held that it cannot review a question of fact based upon affidavits unless the affidavits are brought before the court by the method provided by law for bringing evidence into this court. This was not done in this case. The appellant caused the affidavits to be certified by the clerk as part of the transcript, and procured a certificate of the judge certifying that the affidavits

<sup>1</sup>Reported in 93 Pac. 517.

Jan. 1908]

Statement of Case.

were "presented to the court, and examined, and passed upon by the court at the hearing of said motion," but this does not comply with the statute. The statute requires that evidence be brought into this court by a bill of exceptions or a statement of facts. *Jacobsen v. Lunn*, 16 Wash. 487, 48 Pac. 237; *State v. Anderson*, 20 Wash. 193, 55 Pac. 39; *Chevalier & Co. v. Wilson*, 30 Wash. 227, 70 Pac. 487; *Anderson v. McGregor*, 36 Wash. 124, 78 Pac. 776; *Soder v. Adams Hardware Co.*, 38 Wash. 607, 80 Pac. 775; *Taylor v. Modern Woodmen of America*, 42 Wash. 304, 84 Pac. 867.

The appeal is dismissed.

[No. 6801. Decided January 17, 1908.]

MARY FORD, *as Guardian etc., Respondent*, v. HEFFERNAN  
ENGINE WORKS *et al.*, *Appellants*.<sup>1</sup>

MASTER AND SERVANT—ASSUMPTION OF RISKS—OBVIOUS DANGERS. A pit or hole three feet square and ten feet deep, in a shop near a drill press then being constructed, and which was uncovered except by a plank three inches by twelve and four feet long, is such an obvious danger that notice must have been taken thereof by a helper, who fell into the hole while assisting to put in place a heavy wheel weighing fifty or sixty pounds, where it appears that the place was light, that he had just previously assisted in carrying and laying down a shaft within a few feet of the hole, that in carrying the wheel to the hole he had stepped on the plank over the same, and in some unexplained manner had lost his footing and fell into the hole.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered January 29, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages for the death of an employee, resulting from injuries sustained in a machine shop. Reversed.

<sup>1</sup>Reported in 93 Pac. 417.

*Ira Bronson, D. B. Trefethen, R. S. Eskridge, and Philip Tindall, for appellants.*

*Walter S. Fulton, for respondent.*

DUNBAR, J.—This action was brought by the respondent to recover from the appellants damages alleged to have been suffered by the respondent through the death of her husband while in the employment of appellant, the Heffernan Engine Works, on the 16th day of June, 1906. Said appellant was engaged in operating machine shops. The deceased at the time of the accident had been in the employment of the appellant as a helper for about three weeks. Most of this time he had been employed in outside work, and had been at the shops of the appellant but a few days previous to his injuries. The shops maintained by the appellant were two in number, an inner and an outer one, and the deceased's duties had kept him most of the time in the outer shop. On the 16th day of June, one John Curry, a machinist and an employee of the appellant, was at work upon a drill press situated in the rear of the inner shop. He made application to the foreman for a helper, and was directed by the foreman to obtain as such helper the deceased. Curry called the deceased from his work in the outer shop, and asked him to assist him in putting a wheel upon parallel bars maintained in connection with the drill press. At the south side of the drill press was a pit or hole about three feet square and ten feet deep. All the guard there was to this hole, after the door which covered it had been taken off for the purpose of doing the work then in progress, was a plank three inches by twelve and about four feet long; so that it will be seen that the entire hole was not covered by the plank. While assisting Curry to carry the wheel, weighing between fifty and sixty pounds, to the parallel bars projecting from the south side of the drill press, the deceased stepped upon the plank and in some manner missed his footing, stepped forward, presumably into the hole, and was precipitated upon

Jan. 1908]

Opinion Per DUNBAR, J.

one of the parallel bars, receiving an injury from which he died in a few days.

The acts of negligence relied on by the respondent were the maintenance by appellants, without notice to the deceased, of the hole heretofore described, and requiring the work in the immediate vicinity of this hole without notice or warning of its existence, and the failure to guard or protect the said hole. Upon the trial a verdict in favor of the respondent was returned in the sum of \$10,448. Appellants moved for judgment *non obstante veredicto*, upon two grounds: (1) the insufficiency of the evidence to sustain the verdict; (2) that the special finding of the jury establishes freedom of appellants from liability. This motion was denied and judgment entered upon the verdict. From this judgment the appeal was taken.

We think all the circumstances surrounding this case show conclusively that the deceased, if he was an ordinarily prudent man, knew, or ought to have known, of the existence of this hole, and if that be true, respondent cannot recover, for if it was a dangerous place the danger was apparent to deceased. Respondent relies largely upon the case of *Bailey v. Mukilteo Lum. Co.*, 44 Wash. 581, 87 Pac. 819, where it was said by this court that the servant, when directed by the master to work in a certain place, has a right to assume that he will not be exposed to unnecessary perils, or in other words, that such a direction or order implies an assurance of reasonable safety. This has been the uniform announcement of this court, and we have no desire to retreat from that position now. But it has been just as well established by this and all other courts that, where the danger which beset the servant was apparent, it was equivalent to notice from the master of the existing danger.

Respondent also relies upon the case of *Johnson v. Tacoma Mill Co.*, 22 Wash. 88, 60 Pac. 53, where a carpenter who was making repairs on a mill was injured by stepping back-

ward into a barrel of hot water, the barrel being used to receive the water and steam from an exhaust pipe from an engine in the mill; the presence of the barrel being unnoticeable, by reason of the water in the barrel having pieces of bark floating on it and by reason of no steam arising from the barrel at the time. It was said by this court that it was not the duty of the respondent to look for the barrel of water notwithstanding he could have seen it if he had looked, for the reason that he naturally would not look for it not knowing of its existence, and for the further reason that it did not appear that it was a necessary or common attachment to the mill, or, if it was, that it was the custom to leave it uncovered. In that case it was said that the barrel was not an incident to the business of putting up a pipe, and, under the testimony, was not so conspicuous as to challenge attention. Distinguishing that case from that which it seems to us is the case at bar, the court said: "The plaintiff was not injured by anything he was working with or upon." While in this case the cause of the injury was the hole which was connected with the machinery upon which the deceased was working, and he would therefore be required to take notice of the condition of things surrounding the place where he was working.

There is very little testimony which is material to the issues in this case. The only eyewitness to the accident was Curry, who was the agent of the company in the performance of this business. He testified that he asked deceased to help him carry this spur wheel, which is a metal wheel about twenty inches in diameter and three inches thick, and place it upon these parallel bars; that he took hold of one side of the wheel and deceased the other, and that they moved along until they reached the platform. When they stepped upon the plank which we have before described and while attempting to adjust or place the wheel upon the parallels, the deceased in some manner fell and fell astride of the parallel bar.

Jan. 1908]

Opinion Per DUNBAR, J.

In his direct examination Curry testified that deceased stepped off into the hole, but upon his cross-examination he admitted that he did not see deceased step, could not see him because the wheel intercepted his vision, and finally admitted that the facts which he had rehearsed in relation to his stepping off were not facts at all which he had observed, but were only inferences which he had drawn from the fact that the deceased was upon the plank and that he had fallen off. So that the cause of his falling off is somewhat problematical. But conceding that he actually did step off, and conceding also that he had not had any verbal notice from Curry or anyone else as to the existence of this hole, the testimony shows that, notwithstanding it was a somewhat cloudy day as shown by the minutes of the weather bureau, it was one of the longest days of the year and near the middle of the day; that the front of the shop was made of glass, and that there was sufficient light in the shop to do ordinary work. We think it shows conclusively that there was sufficient light to have enabled the decedent to observe the hole. This must have been true, for Curry testifies that it was light enough for him, after the decedent was hurt, to finish the work alone, and light enough for him to see the small hole in the spur wheel to put the spindle in and turn it around so the key would fit in the key slot. It must have been light enough to do this with comfort and safety, and light enough to easily observe everything around the work, or Curry would have resorted to the lights which hung in reach of him and which were placed there to be turned on when the light was not sufficient.

In addition to this, it appears from Curry's testimony that they passed near by this hole when deceased came into the shop with him, and that before they brought the wheel they brought a shaft and laid it down within a few feet of the hole. This shaft was to be placed in the hole, and it is but reasonable to suppose that, when the deceased helped to bring this shaft, placing it near the hole, leaving it there and going off to get the wheel in which the shaft was to be adjusted, he

must have taken notice of the conditions existing at the place at which he was called upon to work. He must also have noticed when he stepped upon the board—the board being about three inches thick—which raised him up to a plane about eight inches below the top of the parallel bars.

Considering alone the testimony of the respondent in the case, we are forced to the conviction that the decedent knew of the conditions at the place where he was hurt, and that his death occurred through one of those unfortunate accidents for which no one can be held responsible.

The judgment is reversed with instructions to dismiss the action.

HADLEY, C. J., ROOT, MOUNT, CROW, and RUDKIN, JJ.,  
concur.

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[No. 6772. Decided January 17, 1908.]

WILLIAM M. RIDPATH, *Appellant*, v. SPOKANE STAMP WORKS,  
*Respondent*.<sup>1</sup>

LANDLORD AND TENANT—NUISANCE—UNLAWFUL USE BY TENANT—EVIDENCE—SUFFICIENCY. The evidence is sufficient to show that the operation of a stamp mill in a leased storeroom, on the ground floor of a hotel building, is a nuisance which the landlord has a right to have abated by termination of the lease, and it is error to grant a nonsuit in his action of forcible entry and detainer, where it appeared that the operation of the machinery severely shook and jarred the building to such an extent as to greatly annoy the guests everywhere in the hotel, and prevent the leasing of certain rooms.

Appeal from a judgment of the superior court for Spokane county, Yakey, J., entered November 20, 1906, upon granting a nonsuit at the close of plaintiff's testimony, dismissing an action of forcible entry and detainer, after a trial before the court without a jury. Reversed.

*Henley & Kellam*, for appellant.

*John C. Kleber*, for respondent.

<sup>1</sup>Reported in 93 Pac. 416.

Jan. 1908]

Opinion Per Curiam.

PER CURIAM.—The appellant is, and was at the time of the making of the lease hereinafter mentioned, the owner of a four-story brick block in the city of Spokane. The lower or ground floor rooms were designed and used for storerooms, and the other floors were designed for and used as a hotel. It is conceded that the hotel is elegantly and expensively furnished, and has at all times been conducted as a first-class hotel. On the first day of July, 1906, appellant leased to the respondent one of the storerooms on the first floor of the hotel, and respondent went into possession thereunder. The lease is not introduced in evidence, but it is admitted that it was executed, and its terms are undisputed. The complaint alleged, that the lease contained no express restrictions or provisions as to noise, confusion, shaking, or jarring of the building, and that at the time of and prior to the making of the lease it was represented by respondent to appellant that the storeroom was to be used only as a display and salesroom for its manufactured products, and that there would be created no noise, nor would there be anything about the conduct of its business to disturb in any manner the guests or patrons of said hotel. This allegation was denied by the answer, and it was claimed that the appellant knew that the respondent intended to operate a stamp mill in said building, and consented to its operation. On this question the appellant, Ridpath, testified that it was stipulated and agreed that there should be no machinery placed in the room that would in any manner be offensive or create a noisy disturbance.

It was shown that, shortly after the execution of the lease, the respondent did install in the leased room a system of machinery propelled by electric power, and that the operation of such machinery created excessive noise, and the jarring, shaking, and vibration of said building. The appellant, after complaining to respondent of the discomfort and injury the operation of said machinery was causing him, gave respondent the notice required by law and brought this action under the

unlawful detainer statute. On the conclusion of the plaintiff's testimony, the court sustained defendant's motion for a nonsuit, holding that there was not sufficient testimony to go to the jury upon the question of nuisance. Judgment was rendered against plaintiff, dismissing the action, and from this judgment plaintiff appeals.

Many assignments of error are made in relation to the ruling of the court in sustaining objection to the testimony offered by the appellant. But without entering upon a discussion of these alleged errors and saying merely in passing that the court seemed to have adopted a very strict rule in relation to the proof offered by the appellant to sustain the allegations of the complaint, we think, on the merits of the case, that the court erred in taking the case from the jury and granting the nonsuit, and that there was sufficient testimony to have been submitted to the jury on the question of whether or not the operations of the respondent constituted a nuisance within the meaning of the law.

For the purposes of this case it must be conceded that there was no permission given to the lessee to operate the machinery in the manner in which it was operated, there being no testimony offered by the respondent on that subject. There was testimony by about a dozen witnesses, some of the guests in the hotel, others employees therein, by tradesmen in the neighborhood, and by the owner of the hotel, that the machinery created such a noise and quivering in the rooms of the hotel, including the parlor, that it was very annoying to the guests and occupants. Mr. Herman Cominsky testified that the stamp when dropping created a very heavy noise—as he described it, like a large hammer dropping on a piece of iron—and that the vibrations were very strong, so much so that they shook the building. Mr. Lockheart's description of the noise made by the machinery was as follows: "It makes quite a buzzing and roaring noise. Reminds one to some extent of being on the street cars when air brakes are running." He also testified that the noise of the hammer dropping was like

Jan. 1908]

Opinion Per Curiam.

the hammer dropping on metal; that the hotel outside of this was a very quiet hotel, and desirable for roomers, and that the machinery made a buzzing and disagreeable noise for guests to endure. Mr. Bernheart, who lived in the hotel, also testified that the machinery made a great racket and noise and disturbed the guests. He was a clerk in the office of the hotel, and testified that it disturbed him in the office in the performance of his work; that the rumbling of the noise and vibration and the hammer was very loud, and he could not do his work as effectively in the office while the machinery was in operation as when it was not; that it could be heard all over the house and in all the rooms in the house; that he had had complaints from all the guests, and on several occasions had to move people out of certain rooms where the noise was so loud that it could not be endured; and that they had lost the leasing of the rooms on that account; that it was worse on the second floor and in the parlor, but that the vibrations reached throughout the hotel, the witness saying: "It does vibrate the building. In fact, you cannot stay in the rooms on the second floor where this is without getting the jars, not only from the beds and chairs, but all over the rooms, and even standing on the floor;" that he could not use the parlor while the machinery was going on; people could not sit there, and that it was not fit for use at all, and that he had had to let people go out of it on account of this noise. One witness testified that the vibration was of such force that it affected everything in the room, and that as you stood on the floors you could feel it go through you. The testimony of the appellant Ridpath was in part as follows:

"Question. State what occurred after these people took possession of this room in your building. Answer. Sometime—I think it was in August—I went around to the hotel office and I heard a terrible noise in the building and I went to see what it was, and discovered it was machinery running under the floor of the parlor. Mr. Bernheart was with me at the time and we rushed down to the street, and went into the

store and Mr. Bernard was there, and I said, 'You must stop that, it will not do at all, and it will drive everybody out of the hotel.' And he said he would take it down and I went out."

He also testified that on Sprague street he had heard the falling of the hammer distinctly, and described the noise as being like that made by a separator of a threshing machine; testified that it shook the glassware on the chandeliers; that you could feel the vibrations of it on your body anywhere in the hotel; that it created an unnatural and unpleasant condition; that it sometimes ran for several hours in the day and sometimes for a few minutes, and that it jarred the building and was so severe that the floors quivered so that no one would want to stand on them. Mrs. Green, a roomer in the hotel, stated the noise produced by the machinery was loud enough to annoy anyone, and she was annoyed to such an extent that she had complained about it to the clerk in the building. She stated that it was severe enough to annoy one "dreadfully," and that it annoyed her to such an extent that several times she had dressed and gone out of her room to get rid of it; also stated that she was a woman in good health and not nervous. When asked to describe the noise she said that it reminded her very much of the first shock of the earthquake in San Francisco; that people were not able to engage in conversation in the parlor, nor carry on conversation during the time the machinery was running; that it would be impossible to do so; and without specially reviewing the testimony, there is testimony of several other witnesses to the same effect. If this testimony is true, and it stands now uncontradicted, not being shaken in any way by the cross-examination, the operation of the machinery unquestionably under all authority constituted a nuisance which the owner of the building would have a right to have abated.

The judgment of the lower court is therefore reversed, with instructions to overrule the motion for a nonsuit and to proceed with the trial of the cause.

Jan. 1908]

Opinion Per FULLETON, J.

[No. 6726. Decided January 20, 1908.]

GUS JOHNSON, *Respondent*, v. GREAT NORTHERN LUMBER  
COMPANY, *Appellant*.<sup>1</sup>

APPEAL—REVIEW—VERDICT. A verdict approved by the trial judge will not be disturbed on appeal because against the testimony of a witness not directly contradicted; since his credibility was for the jury.

MASTER AND SERVANT—RELATION—INDEPENDENT CONTRACTOR—EVIDENCE—SUFFICIENCY. The evidence sufficiently supports a finding that a person was not an individual contractor, and the master is liable for his negligence in blasting for an excavation, where evidence as to his contract was incomplete, the contract providing that the master should furnish all the powder, tools, and helpers for doing the blasting, without any restrictions as to the amount or cost thereof, and lacked such essential matters as to tend to impeach its good faith.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered November 19, 1906, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in a sawmill through the negligent firing of a blast. Affirmed.

*Kerr & McCord*, for appellant.

FULLETON, J.—The respondent brought this action to recover for personal injuries received by him while in the employ of the appellant and which he alleges were caused by the negligent acts of persons for whose acts the appellant is responsible. The undisputed evidence is, that the appellant was engaged in the operation of a sawmill, and that the respondent was one of its employees; that the appellant desired to enlarge its mill, and employed one Veratt to excavate some earth and rock that were in the way of the installation of some additional boilers; that Veratt undertook to remove the rock by blasting, and in so doing fired a blast without notice to re-

<sup>1</sup>Reported in 93 Pac. 516.

spondent and while respondent was in the mill adjoining engaged in his usual occupation; that the blast threw great quantities of the broken rock into the air, some of which came down through the roof of the mill and struck the respondent, severely and permanently injuring him. The appellant defended on the ground, among others, that Veratt was an independent contractor, and that the negligence which caused the respondent's injury, if any negligence there was, was Veratt's negligence, for which Veratt alone is responsible, and for which the appellant is not liable. The appellant's superintendent testified that he made the contract with Veratt for removing the rock, and that the contract was to the effect that Veratt should do the work on his own responsibility, being responsible to the appellant only for its results. At the conclusion of the case the appellant challenged the sufficiency of the evidence, and moved the court to discharge the jury and enter judgment in favor of the appellant. The challenge and motion were denied, and the cause was submitted to the jury under an instruction to the effect that if they found that Veratt was an independent contractor the appellant was not responsible for any injury occurring because of his negligent acts. The jury returned a verdict in favor of the respondent for \$3,000, on which judgment was afterwards entered. This appeal was taken from the judgment so entered.

The appellant contends that there was no contradiction, either directly or indirectly, of the evidence on its part tending to show that Veratt was an independent contractor, and that in consequence the court erred in submitting the question to the determination of the jury, and that it is entitled for that reason to a reversal of the judgment by this court with a direction to the court below to enter judgment in its favor. The appellant does not complain that there was any error in the court's instruction defining an independent contractor. On the contrary, it quotes the instruction in its

Jan. 1908]

Opinion Per FULLERTON, J.

brief in full, and expressly states in its comment thereon that it correctly states the law. It bases its claim of error entirely on the fact that its evidence on this particular point was wholly uncontradicted. But it seems to us that if we concede that the appellant's witness did testify to facts sufficient to show that Veratt was an independent contractor, and that there is nothing on the face of the record that directly contradicts him, it still would be going too far for this court to reverse the cause and direct a judgment in favor of the appellant.

There still remains the question of the credibility of the witness. This was a question peculiarly within the province of the lower court and the jury to determine. They had the witness before them. They could observe his conduct upon the witness stand, his apparent frankness or lack of frankness, and his demeanor generally. These matters are not depicted in the record, and this court is without opportunity to know how far the witness's credibility was affected by them. When, therefore, the trial judge and the jury both find that his evidence was not sufficient to overcome the case made by the respondent, this court ought not to interfere with their finding.

But we think the record itself discloses matters that suggest, to say the least, the improbability of the witness's story. The contract as related by the witness was singularly incomplete. The contract provided that the appellant should furnish the powder, the tools, and such helpers as Veratt might require in the performance of the work at its own cost and expense, and fixed Veratt's compensation at a given sum, yet it placed no limitation whatever on the quantity of powder, the character of the tools, or the number of helpers Veratt might lawfully exact under it. It provided also that Veratt might hire and discharge his helpers, but was silent as to the wages he might lawfully contract on the appellant's behalf to pay them. It may be that in a contract of this nature a reasonable limitation would be implied as to the matters not ex-

pressly stipulated for, but this does not meet the point. The lack of agreement in matters so essential tends to impeach the good faith of the contract; it leads to the conclusion that it was either a mere subterfuge to avoid liability on the part of the appellant, or that it was an afterthought on the part of the witness. Veratt was dead at the time of the trial, but it is in the record that he had no very high regard of the obligation he assumed by virtue of the contract. He worked on the job at most only a day and a half before the accident and quit the morning after.

But it is needless to discuss the matter further, the judgment should be affirmed, and it will be so ordered.

HADLEY, C. J., RUDKIN, MOUNT, and CROW, JJ., concur.

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[No. 6911. Decided January 20, 1908.]

A. A. AMES, *Respondent*, v. FARMERS AND MECHANICS BANK.  
*Appellant*.<sup>1</sup>

BANKS AND BANKING—DEPOSITS—RELATIONS WITH DEPOSITORS—AUTHORITY TO OPERATE BRANCH BANK—EVIDENCE—ADMISSIBILITY. Upon an issue as to whether a defendant bank authorized the establishment of a branch in a nearby town, it is competent to show that an advertisement was published in a newspaper making such representation, and that the same was mailed directly to the defendant, and also of a similar circular received by the defendant at its office; it being for the jury to say whether the defendant bank had knowledge of the contents of the paper and circulars.

SAME. Upon such an issue, an application and a surety bond containing recitals that the branch bank was controlled by the defendant bank, signed by the executive officers of both banks, are admissible in evidence, where the course of dealing was such that the directors by ordinary diligence could have known the facts.

SAME. For the same reason, letterheads of letters sent to the defendant bank containing the statement that it was a branch of the defendant, are admissible in evidence.

<sup>1</sup>Reported in 93 Pac. 530.

Jan. 1908]

Opinion Per HADLEY, C. J.

**EVIDENCE—WRITING—PART OF INSTRUMENT—APPEAL—REVIEW.** It is not error to admit in evidence only part of an assignment of a cause of action, where the detached part was excluded at the instance of the appellant as improper, and sufficient appears to show respondent's right to sue.

**BANKS AND BANKING—DEPOSITS—ACTIONS TO RECOVER—PLEADING—ISSUES—INSTRUCTIONS.** In an action to recover bank deposits in an alleged branch of the defendant bank, where the whole controversy was as to whether defendant had at all times been in possession of the branch bank, an affirmative defense that the plaintiffs were in possession of the assets raises no new issue, and instructions thereon are properly refused.

**BANKS AND BANKING—AUTHORITY TO OPERATE BRANCH—RATIFICATION—ACTIONS TO RECOVER DEPOSITS—INSTRUCTIONS.** In an action to recover bank deposits in an alleged branch of the defendant bank, where the issue was as to the knowledge of the defendant, it is proper to instruct that the defendant would be liable if it failed to repudiate the operation of the branch bank within a reasonable time after having knowledge that it was being conducted by its officers as a branch, to the same extent as if its officers were given precedent authority; and the same is not open to the objection that it authorizes ratification upon mere constructive knowledge.

**APPEAL—RECORD—STATEMENT OF FACTS—COSTS—REVIEW OF EXCEPTIONS.** Exceptions to a cost bill cannot be reviewed where the evidence on the hearing was not brought up by a bill of exceptions or statement of facts, and counsel do not agree as to what matters were considered by the court.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered December 26, 1906, upon the verdict of a jury rendered in favor of the plaintiff, in an action to recover a balance on unpaid bank deposits. Affirmed.

*Merritt, Oswald & Merritt*, for appellant.

*H. M. Stephens*, for respondent.

**HADLEY, C. J.**—This is an action to recover the balance of unpaid bank deposits. The complaint states one hundred and four causes of action, representing the claim of the plaintiff as a depositor on his own account and also those of

one hundred and three other depositors, assigned to the plaintiff for the purposes of suit. The complaint avers that the defendant, Farmers and Mechanics Bank, is a corporation under the laws of this state, having its principal place of business in Spokane, and that it is authorized by its articles of incorporation to do a general banking business in as many places as it may determine to carry on such business. It is alleged that the defendant also did a general banking business at Cheney, in Spokane county, from the 5th day of July, 1904, to the 6th day of July, 1906; that the business so done at Cheney was transacted under the name of "Farmers and Merchants Bank." In the first cause of action it is alleged that from time to time the plaintiff deposited with the defendant, through its officers and agents doing business at Cheney, various sums of money, and that on the 6th and 7th days of July, 1906, the plaintiff had on deposit with defendant at Cheney, and the defendant then owed the plaintiff, the sum of \$772.20, which remains unpaid; that on said July 7, the defendant refused to pay to plaintiff said sum or any part thereof, and still refuses so to do; that on said date the defendant purported to close its doors and business at Cheney. Similar allegations are made as the basis of the other causes of action, including also allegations as to the assignments to plaintiff. Judgment is prayed for the sum of \$10,745.03, with interest.

By stipulation it was agreed that one answer should be treated as a separate answer to each of the causes of action. The answer denies that the defendant did a banking business at Cheney; admits that it did a general banking business at Spokane, but denies any indebtedness on account of the matters set forth in the complaint. The cause was tried by a jury, and a verdict was returned in favor of plaintiff for the sum of \$10,004.66. Judgment was entered for the amount of the verdict and for costs. Defendant moved for a new trial, which was denied, and it has appealed.

Jan. 1908]

Opinion Per HADLEY, C. J.

There is but one designated assignment of error in the brief, which is that the court erred in overruling the motion for a new trial. Many separate points are discussed in argument as included within the one assigned error. We will now consider the points which are specifically argued in the brief. An advertisement of the bank at Cheney was published in the Cheney Free Press, a newspaper published at Cheney. It was published at the instance of a Mr. Henning who had immediate charge of the bank at Cheney. Henning, respondent claims, acted as the agent of appellant, but appellant denied his agency. The advertisement was as follows:

"THE FARMERS AND MERCHANTS BANK, CHENEY, WASH.  
"(Branch of the Farmers and Mechanics Bank of Spokane  
"Capital \$50,000.00)

"To the Public:

"We have opened for business in our temporary location opposite the postoffice and respectfully invite your patronage. Even if you have no business to transact, we shall be pleased to have you call and get better acquainted with us.

"Very truly yours, A. H. Henning, Cashier.

"General Banking Business. Bank Drafts and Money Orders.

"Interest Paid on Time Deposits."

It will be observed that the advertisement states that the bank at Cheney is a "branch of the Farmers and Mechanics Bank of Spokane." It was offered in evidence by respondent and was admitted with the understanding that it was competent evidence as bearing upon the fact that the bank at Cheney was a branch of appellant if the advertisement was brought to the attention of appellant, and with the further understanding that it would be followed with other evidence showing that it was brought to appellant's attention. The publisher of the newspaper afterwards testified that he mailed the paper, postage prepaid, to the appellant at Spokane. The argument is made that the advertisement was no more than the declaration of one who claimed, after the transaction, to have been an agent. We think, in view of the whole evidence, it was not incompetent. The evidence tended to show that

the affairs of the bank were, by a course of dealing, largely left with the executive officers in the immediate charge of the banking business. The testimony without doubt showed that the bank at Cheney was organized by the authority of Mr. Swanson, vice president of appellant, and that Mr. Henning was by him placed in charge. The publication in the paper was a direct assertion to the public that the bank at Cheney was a branch of appellant, and when it appeared that the paper containing the advertisement was mailed directly to the appellant at its home office, it was for the jury to say under all the circumstances whether appellant had knowledge of its contents. The same was true of an advertising circular which contained a similar statement and to which objection was also made. That this circular was received at appellant's Spokane bank was testified by Swanson, but he did not say that he knew that other officers saw it.

A depository bond and the application to the surety company therefor were admitted in evidence over appellant's objection. The bond was made to secure the treasurer of the city of Cheney who had selected the bank at Cheney as a depository for public moneys. The application was made in the name of appellant, and was signed by Swanson as appellant's vice president and by Mr. Claney as its cashier. It contained the following statement:

"This application made to secure bonds for purpose of protecting against loss all moneys deposited in Farmers & Merchants Bank of Cheney, Washington, a private institution controlled by this bank, and this bank holding itself responsible for said bank."

The bond executed in pursuance of the application was executed by both banks as principals and by Fidelity & Deposit Company of Maryland as surety, and contained the following recitals:

"Whereas, the Farmers and Merchants Bank of Cheney, Washington, is controlled by the Farmers and Mechanics Bank of Spokane, Washington; and

"Whereas, said Farmers and Merchants Bank has been se-

Jan. 1908]

Opinion Per HADLEY, C. J.

lected by said A. A. Ames, Treasurer of the City of Cheney, Washington, as a depository for public moneys coming into his hands as said Treasurer; and

"Whereas, by reason of the Farmers and Mechanics Bank of Spokane, Washington, controlling and directing the Farmers and Merchants Bank of Cheney, Washington, it is deemed proper that the Farmers and Mechanics Bank of Spokane, Washington, join as a co-principal in this bond to said A. L. Ames, Treasurer of the city of Cheney, Washington . . ."

We think it was not error to admit these exhibits. It is contended that the application and bond were admitted without showing any authority of appellant to Swanson and Clancy to execute them. It is true that previous authority from the board of directors was not directly shown, but the exhibits did show knowledge on the part of two of the active executive officers of the bank that the bank at Cheney was being held out as a branch of appellant, and that the treasurer of the city of Cheney, who was about to become a depositor of public funds, so understood it. With this knowledge on the part of two such active officers who, as the evidence tended to show, were largely charged with the control of the bank's affairs, it was for the jury to say whether the course of dealing of appellant was such as showed that the knowledge of these officers became, under the circumstances, the knowledge of appellant. It was also shown that the president of appellant possessed practically the same knowledge upon the subject as that of the vice-president and cashier. Without doubt the patrons of the bank at Cheney must have understood from its beginning that it was a branch of appellant, and the evidence shows that such transactions were had between the two banks as may well be said to have indicated such a relationship. It was therefore for the jury to say whether appellant's board of directors, by the exercise of reasonable and ordinary diligence, should have known the facts. It was the duty of the directors to exercise such diligence in the premises. In *Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. Ed. 49, the court said:

"Directors cannot, in justice to those who deal with the

bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect the officers of the bank, and to make declarations of dividends. That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

See, also, *Coolidge v. Schering*, 32 Wash. 557, 73 Pac. 682; *Rattelmiller v. Stone*, 28 Wash. 104, 68 Pac. 168.

Numerous other objections were made to the admission of testimony in the way of letters written by appellant's officers, and of letters addressed to them. What has been hereinbefore said applies to that testimony. Upon its face it at least had some bearing upon the subject in hand. Letter heads of letters sent from the bank at Cheney to appellant contain the statement in a conspicuous way that the one bank was a branch of the other. A letter written by appellant's cashier related to the lease of the premises occupied by the bank at Cheney. All this evidence was admissible for whatever value it possessed, and it was for the jury to pass upon the questions of knowledge and authority as heretofore stated.

Objection was made to the introduction of the writing under which respondent claims as assignee of the other claimants. It is urged that a part of the writing was detached and excluded as improper, and that it was error to admit only a part of it. The detached part is not in the record, and we cannot determine whether it was properly excluded or not. The record shows that the segregation of parts of the writing was at the instance of appellant. There is sufficient in the record to show assignments supporting respondent's right to sue.

Appellant complains that the court did not instruct the jury concerning what it calls its affirmative defense. That defense was the mere statement that respondent, together with

Jan. 1908]

Opinion Per HADLEY, C. J.

his assignors, had been in possession and control of the assets of the bank at Cheney, and that no part thereof had ever come into the possession of appellant or its agents. The whole controversy raised by the complaint and denials thereto was whether appellant had all the time been in possession through its agents. The affirmative matter therefore raised no new issue. It could not be treated as intended for the purposes of set-off, for appellant in no way admitted a liability against which there could be a set-off. Moreover, the evidence did not show the value of the assets so that the jury could make application thereof by way of set-off. It was shown that a dividend payment had been made from the assets upon deposits, and it is conceded by respondent that whatever remains by way of assets should be applied to reduce the judgment against appellant, but it is contended that the possession of the assets is held for appellant by agents of the latter, and under the issues the finding of the jury would seem to establish such fact. The court therefore did not err in refusing to instruct as to the so-called affirmative defense.

The court instructed the jury in effect that one is liable to the same extent by subsequent ratification that he would be by precedent authority; that if they should find that any officer of appellant purported to start or open a branch bank at Cheney and to do business on behalf of appellant, representing that it was a branch bank of appellant and that the appellant, through its officers or stockholders, thereafter became aware thereof and failed within a reasonable time to repudiate said things, then it, by and through its officers and stockholders, is presumed to have ratified such things and, if ratified, it will be bound thereby. It is contended that the doctrine of ratification or acquiescence based upon constructive knowledge was repudiated by this court in *Heinzerling v. Agen*, 46 Wash. 390, 90 Pac. 262. We think the instruction in question, when considered as a whole, does not authorize the finding of a ratification upon mere constructive

knowledge, but that it is rather based upon the theory of knowledge which may have come to the appellant itself through its officers or stockholders, and it was for the jury to find whether such knowledge came to appellant through the source mentioned. Considering all the instructions together, we do not think the jury were misled, and we believe no prejudicial error was committed either in giving or in refusing to give requested ones.

Appellant excepted to respondent's cost bill as filed in the trial court, and supported the exceptions by counsel's affidavit that the facts stated in the exceptions were true. The record shows that, after a hearing and after being fully advised in the premises, the court denied the exceptions. There is, however, nothing in the statement of facts showing what evidence was before the court at that hearing, or what matters and facts were considered by the court in reaching its conclusion. We cannot therefore review the court's finding upon that subject. It is true appellant's counsel say that no affidavits were filed except the one above mentioned, but respondent's counsel says that additional statements and matters were taken into consideration by the court at the hearing. With such dispute existing the certificate of the trial court is necessary to inform this court what facts were considered.

We think it was not error to deny the new trial, and the judgment is affirmed.

MOUNT, CROW, and ROOT, JJ., concur.

DUNBAR and RUDKIN, JJ., took no part.

Jan. 1908]

Opinion Per RUDKIN, J.

[No. 6874. Decided January 20, 1908.]

**Z. A. LANHAM *et al.*, Respondents, v. WENATCHEE CANAL  
COMPANY, Appellant.<sup>1</sup>**

**WATERS—IRRIGATION—REVOCATION OF LICENSE—INJUNCTIONS—TEMPORARY INJUNCTION—CONDITIONS.** A preliminary mandatory injunction requiring an irrigation company to deliver water from a certain ditch, pursuant to an agreement for water from its main canal, cannot be sustained on the theory that a parol license to take water from such ditch had been granted temporarily, and that it would be inequitable to allow a revocation of the license without notice; since the license may be revoked without notice, and no such injunction can be granted unless the right is clear and certain.

Appeal from an order of the superior court for Chelan county, Steiner, J., entered May 20, 1907, granting a temporary mandatory injunction requiring an irrigation company to deliver water to the plaintiff under the terms of a water right agreement. Reversed.

*Reeves & Reeves*, for appellant.

RUDKIN, J.—On the 1st day of June, 1904, the defendant corporation entered into a certain water right agreement with the plaintiff Z. A. Lanham whereby the defendant transferred and sold to said Lanham a perpetual right to the use of water from the irrigation system of the defendant company, consisting of main and lateral canals and other works in Chelan county, to the amount of 38-100 of one cubic foot per second, from April 15th to October 31st of each year, commencing with the 1st day of June, 1904, for the purpose of irrigating a certain thirty-eight acre tract of land owned by the plaintiffs and for domestic purposes incident thereto. It appears that about eighteen acres of this land is situated above the level of the appellant's main canal and is not sus-

<sup>1</sup>Reported in 93 Pac. 522.

ceptible of irrigation therefrom by gravity flow. In view of this fact, doubtless, the water right agreement contained the following provision: "It is understood and agreed that the purchaser is to have the right to raise such part of the amount of water herein conveyed by pump or otherwise as he may so desire, for the purpose of irrigating that part of the above-described land lying above the grade of the main canal of the said company." The present action was instituted on the 15th day of May, 1907, praying for a mandatory injunction requiring the defendant to deliver water to the plaintiffs' land through a certain ditch known as "The Settler's Ditch," pursuant to the terms of said water right agreement. Upon a hearing had the temporary mandatory injunction was granted as prayed, and from that order the present appeal is prosecuted.

From the affidavits filed at the hearing in the court below it satisfactorily appears that the "Settler's Ditch" is owned by a corporation other than the appellant, and that the appellant is only a stockholder therein. This ditch forms no part of the appellant's irrigation system and is not embraced within the contract under which the respondents claim. It appears, however, that the appellant, as a matter of accommodation, permitted the respondents to take water from the Settler's Ditch to irrigate that portion of their land that could not be irrigated by gravity flow from the appellant's main canal, until such time as the respondents might arrange to pump water from the main canal for that purpose. The court below, as appears from its certificate, was of opinion that the respondents were not entitled to the relief sought under the provisions of the contract upon which the action was brought; but that inasmuch as the respondents had been permitted to take water from the Settler's Ditch under a parol license, it would be unjust and inequitable to permit a revocation of that license, without notice, under the circumstances. We are of opinion that the court below was clearly right in its conclu-

Jan. 1908]

Statement of Case.

sion that the water right agreement did not entitle the respondents to the water claimed by them through the Settler's Ditch, on the showing made at the preliminary hearing, but, however unjust and inequitable it might seem to revoke a parol license granted as a mere matter of accommodation, the appellant was clearly within its rights when it did so, and the court was powerless to prevent it.

If a mandatory injunction may issue at all before final hearing, it is only where the plaintiff's right to the relief is clear and certain. 22 Cyc. 743. In this case the respondents' right to the relief sought was not only not clear and certain, but on the contrary we think the appellant was within its legal rights when it revoked the parol license, if any existed, and refused longer to furnish water where there was neither a legal nor moral obligation requiring it so to do.

The order of the court below is therefore reversed.

HADLEY, C. J., FULLERTON, CROW, DUNBAR, and MOUNT, JJ., concur.

ROOT, J., concurs in the result.

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[No. 6672. Decided January 20, 1908.]

GUSTAV PETERSON *et al.*, Appellants, v. FRANCIS WEIST *et al.*,  
*Respondents*.<sup>1</sup>

VENDOR AND PURCHASER—BONA FIDE PURCHASERS—RESERVATIONS—NOTICE. Vendees are not *bona fide* purchasers without notice of the time allowed for the removal of reserved timber, where they had notice that the timber had been reserved through recitals in a deed through which they claimed title, and they are not entitled to rely upon the statements of their grantors as to the time for removal where inquiry would have disclosed the same.

Appeal from a judgment of the superior court for Cowlitz county, McCredie, J., entered December 1, 1906, upon find-

<sup>1</sup>Reported in 93 Pac. 519.

ings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action to enjoin the removal of standing timber. Affirmed.

*M. A. Langhorne and Forney & Ponder*, for appellants.

*Thos. N. Strong*, for respondents.

RUDKIN, J.—Some time prior to the 11th day of February, 1897, John Baxter and wife agreed to convey the premises now in controversy to T. J. Johnson and Samuel Strom, in consideration of the sum of \$450 to be thereafter paid, reserving, however, all timber growing on the land. On February 11, 1897, Baxter and wife sold all the timber reserved, except the cedar, to A. C. Mowrey, allowing twelve years from date of sale for the removal of the timber. On December 16th, 1901, Baxter and wife, having received payment of the purchase price, conveyed to Johnson and Strom, their deed containing the following reservation clause: "Saving and reserving therefrom all the timber of every kind and character now thereon, except cedar, reserving also the right to pass over the premises wherever necessary to remove the timber herein reserved; possession to be given of the timber and roads when A. C. Mowrey's time is up upon the timber, viz.: 3 years from Feb. 10, 1902." Johnson, one of the grantees named in the above deed, conveyed to the plaintiff Alex Peterson on June 3, 1902, and Strom, the other grantee, to the plaintiff G. V. Peterson on March 28, 1906. The defendants are the officers and employees of the successor in interest of Mowrey and wife in the timber contract. The deed from Baxter and wife to Johnson and Strom was filed for record February 13, 1906; the deed from Johnson to Alex Peterson on January 9th, 1903; the deed from Strom to G. V. Peterson on September 19, 1906; and the timber contract from Baxter and wife to Mowrey and the assignment thereof, on February 23, 1903. The present action was brought to enjoin the defendants from removing timber from the land under the Mowrey contract.

Jan. 1908]

Opinion Per RUDKIN, J.

The only issue in the case was whether the plaintiffs were *bona fide* purchasers for value and without notice of the sale of the timber, or rather of the time allowed for its removal. The court below found that at the time of their purchase the plaintiffs had full notice and knowledge of the sale of the timber and of the time allowed for its removal, and entered judgment dismissing the action. From this judgment the plaintiffs have appealed. The judgment appealed from is manifestly right.

"It is a well-settled rule that where a purchaser has knowledge or information of facts which are sufficient to put an ordinarily prudent man upon inquiry, and the inquiry, if followed with reasonable diligence, would lead to the discovery of defects in the title or of equitable rights of others affecting the property in question, the purchaser will be held chargeable with knowledge thereof and will not be heard to say that he did not actually know of them. In other words, knowledge of facts sufficient to excite inquiry is constructive notice of all that the inquiry would have disclosed." 23 Am. & Eng. Ency. Law (2d ed.), p. 495.

See, also, *Mann v. Young*, 1 Wash. Ter. 454; *Wickman v. Sprague*, 18 Wash. 466, 51 Pac. 1055; *Deering v. Holcomb*, 26 Wash. 588, 67 Pac. 240, 561; *Rattelmüller v. Stone*, 28 Wash. 104, 68 Pac. 168.

Here the appellants had notice of the reservation of the timber, from the recitals in the deed through which they claimed and from other sources; but claim they had no notice of the time allowed for its removal, except the notice conveyed by the recital in the Baxter deed, which was three years from February 10, 1902. If they had no notice of the time allowed for the removal of the timber it was solely because they made no inquiry. They could not blindly rely on the statement of their vendors (*Foster, Neville & Co. v. Stallworth*, 62 Ala. 547) and they made no inquiry from any other source. In fact they made no inquiry of their vendors, but relied on the recital contained in the deed transmitted to them through the mail. We think the court was amply warranted in finding that the appellants had actual notice of all of the facts, in-

cluding the time allowed for the removal of the timber, but the recital in the deed under which they claimed was sufficient of itself to excite inquiry, which, if followed up, would lead to notice.

There is no error in the record and the judgment of the court below is affirmed.

HADLEY, C. J., FULLERTON, CROW, and MOUNT, JJ., concur.

DUNBAR and ROOT, JJ., took no part.

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[No. 6894. Decided January 20, 1908.]

H. H. McMILLAN, *Respondent*, v. CHARLES W. WALKER,  
*Appellant*.<sup>1</sup>

FORCIBLE ENTRY AND DETAINER—EVIDENCE OF TITLE—JUDGMENT—ADMISSIBILITY. In an action of unlawful detainer, a foreclosure judgment establishing a clear legal title in the plaintiff is admissible in evidence, although the defendant was not a party to the foreclosure and his equities were not affected thereby; since his claim of paramount title fails if he does not establish any of his affirmative defenses.

LIMITATION OF ACTIONS—DISABILITY—MINORITY. The ten-year statute of limitations for actions for the recovery of real property does not begin to run against a minor until he attains his majority.

ADVERSE POSSESSION—PAYMENT OF TAXES—CLAIM OF TITLE—EVIDENCE—SUFFICIENCY. A plea of adverse possession of real property, by the payment of taxes for seven years under claim of title, is not sustained by evidence that a third party had paid taxes at defendant's request for quite a while, no year or series of years being specified, nor where evidence of his claim of title by purchase was contradictory and evasive.

Appeal from a judgment of the superior court for Lincoln county, Warren, J., entered December 10, 1906, in favor of

<sup>1</sup>Reported in 93 Pac. 520.

Jan. 1908]

Opinion Per RUDKIN, J.

the plaintiff by direction of the court, upon discharging the jury, after a trial on the merits, in an action of unlawful detainer. Affirmed.

*J. T. Mulligan and Martin & Wilson*, for appellant.

*Neal, Sessions & Myers (H. A. P. Myers, of counsel)*, for respondent.

RUDKIN, J.—This was an action of unlawful detainer, commenced under Bal. Code, § 5549 (P. C. § 1192). In the abstract appended to the complaint the plaintiff deraigns his title as follows: (1) By patent from the United States to Alice Sutherlin; (2) by decree of the superior court of Lincoln county in an action entitled Edmund Sutherlin v. Alice Sutherlin adjudging that the plaintiff Edmund Sutherlin was the owner of said premises and that the defendant Alice Sutherlin had no right, title, or interest therein; (3) by deed from Edmund Sutherlin and wife to Joseph Sessions; (4) by deed from Joseph Sessions and wife to the plaintiff herein; (5) by sheriff's deed executed to the plaintiff herein on foreclosure of a mortgage given by Alice Sutherlin on the 29d day of September, 1890. The answer consisted of a denial of the plaintiff's title, and pleas of the ten-year statute of limitations, the seven-year statute of limitations, and fee simple title in the defendant Walker. At the close of the testimony the court below discharged the jury and directed a judgment in favor of the plaintiff. From that judgment the defendant Walker has appealed.

The appellant first contends that the court erred in admitting in evidence the records in the mortgage foreclosure and in the action of Sutherlin v. Sutherlin above referred to, because he was not made a party to either of said actions. In so far as the mortgage foreclosure is concerned, we deem it sufficient to say that the appellant claimed under paramount title and was neither a necessary nor proper party to that action. The proceedings in either action were ample to vest

the legal title in the respondent, and no claim is made that the judgments barred or cut off any claims or equities of the appellant. The respondent having shown a clear legal title, the judgment of the court below is free from error, unless the appellant established one or more of his affirmative defenses.

The plea of the ten-year statute of limitations is disposed of in what was said by this court in *May v. Sutherlin*, 41 Wash. 609, 84 Pac. 585, involving this same land. Edmund Sutherlin, under whom the respondent claims, was the owner of the legal title until the 2d day of April, 1906. He did not attain his majority until the 28th of February, 1901, and until that date the ten-year statute of limitations did not commence to run. The appellant utterly failed to prove that he paid any taxes whatever on the premises. He testified that he tried to keep the taxes up, and that Mr. May paid them for quite a while during the hard times at his request, but there was no evidence upon which the court or jury could find that taxes had been paid by the appellant, or at his request, for any year or series of years. The testimony of the appellant tending to show that he purchased the property from Alice Sutherlin in the year 1890 was contradictory and evasive. It was utterly insufficient to establish any claim or title in real property, and the court below properly so ruled. The record in this cause shows that the title to this land has been in litigation for more than sixteen years. As soon as one claimant is defeated another turns up asserting some claim under a defendant in some former action. We fully agree with the court below that this litigation should end, at least until some more substantial and meritorious claim is asserted against the property.

The judgment of the court below is affirmed.

HADLEY, C. J., CROW, and ROOT, JJ., concur.

MOUNT and FULLERTON, JJ., took no part.

Jan. 1908]

Opinion Per RUDKIN, J.

[No. 7041. Decided January 20, 1908.]

CHARLES W. RENARD *et al.*, Appellants, v. THE CITY OF  
SPOKANE, Respondent.<sup>1</sup>

MUNICIPAL CORPORATIONS—STREET IMPROVEMENT—SPECIAL ASSESSMENTS—OBJECTIONS—TIME FOR TAKING. Objections to an assessment for a local improvement, in that the plans provide for a rock cut forty feet wide at a cost of \$5,300, while the petition was for a cut thirty feet wide at a cost not to exceed \$3,600, and that wives of community property holders did not sign the petition, go to the regularity and correctness of the decision, within Laws 1901, p. 240, and thereunder no appeal from the assessment can be taken unless written objections to the assessment roll are filed with the city council; hence a protest prior to assessment is insufficient.

SAME—MANNER OF OBJECTING. The statute requiring written objections to a special assessment is mandatory, oral objections at the hearing being insufficient.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered June 16, 1906, in favor of the defendant, confirming an assessment by a city for local improvements. Affirmed.

*Hamblen, Lund & Gilbert*, for appellants.

*J. M. Geraghty* and *Alex M. Winston*, for respondent.

RUDKIN, J.—On the 11th day of July, 1903, property owners on Spofford Avenue, in the city of Spokane, petitioned the city council for the improvement of that avenue between certain points, by grading, parking, and sidewalking. The petition contained the following specification as to the character of the work:

“The grade through the rock cut on said Spofford Avenue to be made thirty feet wide, twenty feet between curb, and five feet on each side of sidewalk, the grade to be put as far south as property line.”

<sup>1</sup>Reported in 93 Pac. 517.

On February 2, 1904, the city council, purporting to act on this petition, passed an ordinance creating an assessment district, approving plans and specifications directing the letting of a contract for the work, and levying an assessment to defray the expenses thereof. On the 8th day of April, 1904, certain property owners on the avenue, including the appellants herein, filed a protest with the city council against the improvement of the street in accordance with the plans prepared by the city engineer, for the reason that the plans provided for a driveway forty feet in width through the rock cut, instead of thirty feet as called for by the property owners' petition, and for the further reason that the cost of the improvement was not to exceed \$3,600, whereas, the estimated cost of the proposed improvement was \$5,307.90. The assessment roll on which the present appeal is based was filed with the city clerk on the 23d day of May, 1904; notice of the filing was published on May 26, 1904, and the time for hearing objections fixed for June 28, 1904. The ordinance confirming the assessment roll was approved September 20, 1904, and thereupon the appellants here appealed to the superior court. The two objections urged in that court were, that the improvements made differed materially from the improvement petitioned for, and that the wives of the petitioners did not sign with their husbands where community property was involved. The court confirmed the assessment, and from its judgment in that regard the present appeal is prosecuted.

At the threshold of the proceeding the appellants are met with the objection that there is nothing before this court for review, for the reason that the appellants filed no written objections to the assessment roll before the city council as required by § 2 of the act of March 16, 1901; Laws 1901, page 240. That section provides as follows:

"Whenever any assessment roll for local improvements shall have been prepared as provided by law, charter or ordinance of any city of the first class, and such assessment roll shall have been confirmed by the council or legislative body of such

Jan. 1908]

Opinion Per RUDKIN, J.

city, after due and proper notice to the property owner, as provided by law, charter or ordinance, so that said owners of property may have a reasonable opportunity to object to or protest against any assessment, the regularity, and correctness of the proceedings to order said improvement, and the regularity, validity and correctness of said assessment cannot in any manner be contested or questioned in any proceeding whatsoever by any person not filing written objections to such roll, prior to the same being confirmed, as aforesaid, and at such time or times as may be prescribed by the charter or ordinance."

It seems manifest that the objections now urged go to the regularity and correctness of the proceedings in ordering the improvement, and to the regularity, validity and correctness of the assessment, and cannot be reviewed by the courts, unless proper written objections were filed. *Annie Wright Seminary v. Tacoma*, 23 Wash. 109, 62 Pac. 444; *McNamee v. Tacoma*, 24 Wash. 591, 64 Pac. 791; *Potter v. Whatcom*, 25 Wash. 207, 65 Pac. 197; *Young v. Tacoma*, 31 Wash. 153, 71 Pac. 742; *Ferry v. Tacoma*, 34 Wash. 652, 76 Pac. 277; *Alexander v. Tacoma*, 35 Wash. 366, 77 Pac. 686; *Aberdeen v. Lucas*, 37 Wash. 190, 79 Pac. 632.

It may be, as contended by the appellants, that objections going to the jurisdiction of the city council to order the improvement or levy the assessment are not waived by failing to file written objections, but the objections under consideration go merely to the regularity of the proceedings in ordering the improvement and are not of a jurisdictional character. But if we are in error in this, nevertheless the right of appeal in these cases is purely statutory, and is limited to those who have filed objections against the assessment roll before the city council. Manifestly the protest filed with the city council against the proposed improvement, nearly two months before the assessment roll was filed with the city clerk, cannot be considered as objections to the assessment roll, and the oral objections made at the hearing were utterly insufficient in both form and substance. Furthermore, inasmuch as the

written objections are made the basis of the hearing before the city council and in the courts, the requirement of the statute that they shall be in writing is mandatory.

The judgment of the court below must therefore be affirmed.

HADLEY, C. J., CROW, DUNBAR, ROOT, and MOUNT, JJ., concur.

FULLERTON, J., concurs in the result.

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[No. 6823. Decided January 20, 1908.]

H. C. PIGOTT, *Appellant*, v. A. B. GRAHAM, *Respondent*.<sup>1</sup>

SALES—FRAUD—ACTION FOR DECEIT—RELIANCE ON REPRESENTATIONS—DUTY TO INVESTIGATE—PLEADINGS—COMPLAINT—SUFFICIENCY. A complaint in an action for damages for deceit in a trade whereby two rival printing establishments in the same city were consolidated, is demurrable for failure to state sufficient facts, where it appears that the vendee and vendor were business managers and stockholders in the rival companies, that the stock on hand alleged to be misrepresented in value was at hand, and there was no allegation that plaintiff could not have conveniently investigated the same and the representations as to outstanding debts, nor that the defendant concealed the property or induced plaintiff to refrain from making an investigation of the stock and financial standing of defendant's company; since no fiduciary relations existed and means of knowledge was equally open to both parties (FULLERTON, J., dissents).

Appeal from a judgment of the superior court for King county, Albertson, J., entered January 3, 1907, upon sustaining a demurrer to the complaint, dismissing an action for damages for false representations inducing the execution of a contract. Affirmed.

*Peters & Powell*, for appellant.

*Chas. F. Munday*, for respondent.

DUNBAR, J.—The appellant brought an action against the respondent for damages alleged to have been caused by reason

<sup>1</sup>Reported in 93 Pac. 435.

Jan. 1908]

Opinion Per DUNBAR, J.

of the deceit and misrepresentation of respondent which induced him to enter into a certain contract. The material facts alleged in the complaint are, that the Metropolitan Press was a corporation having a capital of \$60,000, consisting of six hundred shares of the par value of \$100 each, and that said shares of stock were worth \$65,000, of which stock the appellant, Pigott, owned four hundred and seventy-five shares; that the Graham-Hickman Company was a corporation having a capital of \$50,000, consisting of five hundred shares of the par value of \$100 each; that of this stock Graham, the respondent, owned seventy-seven shares; that each company was doing business in Seattle; that the Graham-Hickman Company was, until the 29th day of March, 1905, engaged in the business of printing and the manufacture of paper boxes in the city of Seattle; that the Metropolitan Press was, until said last-mentioned date, in the printing and binding business in said city; that during the month of March the respondent, Graham, approached the appellant, and opened negotiations with him for the union and consolidation of the business and properties owned by the aforesaid corporations; that said negotiations were carried on between the plaintiff and the defendant and through them with the other stockholders of said corporations respectively, extending over a period of several days; that in order to induce the appellant to consent to such union and consolidation, the respondent stated and represented to the appellant that the Graham-Hickman Company was solvent, in a prosperous condition, and conducting a highly profitable business, and then had on hand a stock of merchandise to the amount in value, according to the inventoried cost thereof, of \$37,932.80; that it had bills receivable of the face value of \$5,447.80, and other property aggregating in excess of \$100; that the said Graham-Hickman Company owed no indebtedness excepting mortgage bonds to the amount of \$42,500, bills payable to the amount of \$2,119, and accounts payable to the amount

of \$3,108.84; that the appellant believed these statements and, so believing and relying upon them, agreed with the respondent that the two companies aforesaid should be consolidated into a new corporation to be called the "Metropolitan Press Printing Company," the property of the two original companies to be transferred to the Metropolitan Press Printing Company, each stockholder of the respective companies to receive such a proportion of one-half of the stock of the new company as his shares in the original companies bore to the capital stock of the new company; and that in consummation of said agreement a new corporation, known as the Metropolitan Press Printing Company, was organized by the stockholders of the Graham-Hickman Company and the Metropolitan Press, on or about the 28th day of March, 1905, with a capital stock of \$100,000, divided into one thousand shares of \$100 each; that the appellant subscribed for three hundred and seventy-six shares of said capital stock, and the respondent subscribed for seventy-seven shares, and that all of the capital stock of said corporation was duly subscribed on the 28th day of March, 1905; that thereupon the Graham-Hickman Company conveyed all of its property and assets of every kind and description to the said Metropolitan Press Printing Company, and at the same time the Metropolitan Press conveyed all of its property and assets of every kind, except a small portion thereof, to the said Metropolitan Press Printing Company; that at the time of making said conveyance to the Metropolitan Press Printing Company, in order to induce this plaintiff to complete and consummate the plan of consolidation as aforesaid, the respondent stated and represented to the appellant that the Graham-Hickman Company was then transferring and conveying to the Metropolitan Press Printing Company all the property and assets which he, the said defendant, had theretofore stated and represented that the Graham-Hickman Company possessed; that in truth and in fact the statements and representations made by the ap-

Jan. 1908]

Opinion Per DUNBAR, J.

pellant to the respondent, to the effect that the said Graham-Hickman Company had, as a part of its property and assets, merchandise of the amount of \$37,932.80, according to the inventoried cost thereof, were false and untrue, and the value of said merchandise was in reality only \$12,847.73; and that the representation that the Graham-Hickman Company did not owe on account of bills payable any amount in excess of \$2,119 was false and untrue, and that it did owe at that time the sum of \$4,544 in excess of the said \$2,119; that the representation that the Graham-Hickman Company transferred all the property and assets of which it was possessed was untrue, and that the representation made that the company was solvent and in a prosperous condition and doing a prosperous business was false and untrue. This suit is brought to recover the difference between the actual value as alleged of the Graham-Hickman Company and the value alleged by the respondent Graham. Demurrer was interposed to this complaint, to the effect that it did not state a cause of action, the court sustained the demurrer, the action was dismissed, and appeal was taken from the judgment of dismissal.

It will be noticed from the complaint that this is a plain action for deceit, the corporations not in any way being involved. But the essence of the complaint is that the respondent, by false representations, induced the appellant to make a trade by which he was damaged; and without discussing any of the preliminary questions discussed by the respondent in relation to the power of the appellant to bring this action, which it is claimed is an action in effect for the benefit of the corporation, we are satisfied that, as between the appellant and respondent, considering them as vendor and vendee, there is no cause of action stated. There is no allegation in the complaint that the property and assets of the Graham-Hickman Company were concealed from plaintiff. There is no allegation that it was impossible or inconvenient for him to have made an examination into the financial standing of the com-

pany. He does not allege that he was induced by Graham to refrain from making such an examination as any prudent person would make under the circumstances. He does not even allege that such an examination was not made. This court in an early case, viz., *Washington Central Imp. Co. v. Newlands*, 11 Wash. 212, 39 Pac. 366, laid down the rule that, where there were no fiduciary relations existing between the seller and the buyer, it was the duty of the buyer to make an examination with reference to the representations made by the seller and as to the value of the property purchased, and that a purchaser who refused to do this could not call upon the law to stand *in loco parentis* to him in the ordinary transactions of business and ordinary dealings with his fellow men.

Cases of this character are frequently hard to determine, for there are so many independent circumstances surrounding each case that it is difficult sometimes to discern the dividing line between that character of fraud and misrepresentation which justifies the purchaser in relying upon such representations, and those representations which are made where the parties are standing on a plane, where the facts which are the subject-matter of the representations are ascertainable, and where it is the duty of the purchaser to put on foot such examination as is necessary to determine the facts concerning which the negotiations are made. But notwithstanding these different circumstances, there are certain basic principles upon which the cases must be adjudicated, and the difficulty is not so much to determine the law as to determine whether the particular circumstances bring the cases within the established rules of law. This court, in the case above referred to, said:

"We think the proper and sensible rule was laid down by the United States supreme court in *Slaughter's Adm'r v. Gerson*, 13 Wall. 379, where it was held that the misrepresentation which would vitiate a contract of sale and prevent a court of equity from aiding its enforcement, must relate to a material matter constituting an inducement to the contract, and respecting which the complaining party did not possess at hand the means of knowledge."

Jan. 1908]

Opinion Per DUNBAR, J.

That court, after announcing the rule as noted, further said, through Justice Field, who delivered the opinion of the court:

"A court of equity will not undertake, any more than a court of law, to relieve a party from the consequences of his own inattention and carelessness. Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to consideration when he complains that he has suffered from his own voluntary blindness and been misled by overconfidence in the statements of another." *Slaughter's Adm'r v. Gerson*, 13 Wall. 379, 20 L. Ed. 627.

This doctrine was followed by this court in *West Seattle Land & Imp. Co. v. Herren*, 16 Wash. 665, 48 Pac. 341; *Griffith v. Strand*, 19 Wash. 686, 54 Pac. 613; *Walsh v. Bushell*, 26 Wash. 576, 67 Pac. 216; *Samson v. Beale*, 27 Wash. 557, 68 Pac. 180; *Sherman v. Sweeny*, 29 Wash. 321, 69 Pac. 1117.

In some more recent cases, for instance in *Mulholland v. Washington Match Co.*, 35 Wash. 315, 77 Pac. 497, it was said that it could not be the law that a person of ordinary faculties may never rely upon representations made to him even though no fiduciary relations existed and that each case must depend upon its own circumstances. In that case the representations were made with regard to an ingenious device for manufacturing matches, and involved a special, skilled knowledge of the mechanism itself. In addition to that, the machine was not at hand and the court found that it did not in fact exist, but that the facts with reference to the existence of such a machine and the patent thereof, together with the ownership thereof, were peculiarly within the knowledge of the appellant's officers and agents who made the representations.

In that case the court held that the purchaser was not entitled to rely upon the representations made by the seller, but reiterated the doctrine that, where the subject-matter was at hand and the truth easily ascertainable, the purchaser must use his senses, and could not afterwards be held to say that he had been defrauded if he neglected to avail himself of the present and reasonable opportunity to learn the truth. This case was followed by *Daniel v. Glidden*, 38 Wash. 556, 80 Pac. 811, and was really the basis of the decision in that case. This case more nearly approaches the facts as stated by the complaint in the case at bar, but yet we think it is easily distinguished in principle. There the payee of a note was induced to loan money by the fraud of officers of the corporation, and it was held that the payees were not bound to investigate the truth or falsity of the representations concerning the financial ability of the corporation, facts which would involve the examination of a concern represented as doing a banking business, and of public records, and a large number of houses said to be building; that the means of knowledge were not open, and that under all the circumstances of that case there was a reasonable call for reliance on the representations made. There, too, the officers, who represented themselves to be doing a certain banking business and who were doing an intricate kind of business, were dealing with people who were not acquainted with that kind of business, and who could probably not have understood the intricate business of the appellants if they had undertaken to make an examination. At least, it would have had to be done by employing expert assistance, and at a great expense and trouble.

But here it will be observed the parties were in the same kind of business, competitors in the printing business in the city of Seattle, both stockholders in the business and stockholders and managers of their respective businesses. It was their knowledge of the business in all its details that prompted them to enter into this consolidation, so that money might be

Jan. 1908]

Opinion Per DUNBAR, J.

made thereby and expenses saved. The property was on hand; it was all in the city of Seattle, and it would have been but an act of the most common kind of prudence on the part of the appellant to have investigated the business and books of the concern which he was practically buying. In fact, the representations made by Graham may have been preliminary, and he may have presumed that Pigott would exercise ordinary prudence and make the ordinary investigations before the trade was consummated. Certainly there is no showing that he was prevented by any manipulation, fraudulent or otherwise, on the part of the Graham Company, from making such an examination. There was no obliteration of evidence in the case, as there was in *Lawson v. Vernon*, 38 Wash. 422, 80 Pac. 559, 107 Am. St. 880, where it was held that the vendee had a right of action where he had relied upon false representations of the vendor in pointing out certain lots as the ones offered for sale, when it developed that the lots pointed out were not the lots for which the deed was given, it appearing in that case that where the lots were located the ground was obscured by brush and trees and that the stakes could not be found; and that under such circumstances the vendee had a right to rely upon the representations of the owner in pointing out the certain lots which he offered for sale.

Nor does this case fall within the rule announced by this court in *Northwestern Lumber Co. v. Callendar*, 36 Wash. 492, 79 Pac. 30, where the representations which the court decided the vendee had a right to rely upon were representations with reference to a patent and the working of machinery. There the court held that the representation of the vendor familiar with machinery amounted to a warranty when relied upon by purchasers unfamiliar therewith, and they were induced to purchase by such representations. On the examination of this case it will be found that there was an attempt to make an examination by the vendee, but not having the peculiar knowledge necessary, such attempt proved futile.

In *Griffith v. Strand*, 19 Wash. 686, 54 Pac. 613, it was held that the purchaser of a stock of goods cannot avoid the sale on the ground of fraud, in that false representations were made to him as to the quality, quantity, and value of the goods, when there was no fiduciary relation between the parties, and when it was within the purchaser's power to readily determine the truth or falsity of such representations by an inspection of the goods. In that case it was said:

"It must not be forgotten that the contracting parties were dealing at arm's length. No fiduciary relations existed between them—nothing to inspire confidence or disarm suspicion—and there was no imbecility of age, weakness or disease. The property in question was at hand, and an inspection of it by the defendants could have been made had they insisted upon it. The representations related solely to quantity, quality and value, the truth or falsity of which could have been determined by an inspection. Under such circumstances, we think it will not do to hold that a party may successfully complain of his own failure to exercise ordinary care, prudence, and caution, when, by the exercise thereof, the injury of which he complains could not have arisen."

This language may, it seems to us, be appropriately applied to this case. While it is true that in that case it was a stock of goods the value of which was involved, in this case it is the value of the property of the Graham-Hickman Company which consisted of goods, book accounts, and of the good will of the business. The value of the goods and book accounts could have been easily ascertained by an examination of the corporation, and the good will of the concern is a character of property so indefinite that a statement of its value must necessarily be regarded by any man of any business acumen whatever as very largely a matter of opinion.

It was more recently decided by this court in *Hulet v. Achey*, 39 Wash. 91, 80 Pac. 1105, that a sale of standing timber and sawlogs could not be rescinded by the vendee for false representations by the vendor as to quality, where no claim was made that there was no opportunity to make ex-

Jan. 1908]

Syllabus.

amination. In fact, the rule announced by the supreme court of the United States in *Slaughter's Adm'r v. Gerson, supra*, which has been consistently followed by this court, it seems to us is entirely applicable to the case at bar. If contracting parties were allowed, after making contracts and agreements with reference to business and property and after discovering that their trade had not been a profitable one, to annul such contracts either by rescission or by actions for damages, it would render the business conditions of the country perilous and uncertain, make contracts unstable and unreliable, and keep the courts of the state busy in determining matters which ought to have been determined by the parties to the contract before they entered into the same.

The judgment is affirmed.

HADLEY, C. J., MOUNT, CROW, and RUDKIN, JJ., concur.

FULLERTON, J., dissents.

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[No. 6847. Decided January 20, 1908.]

RICHARD GREENWOOD, *Appellant*, v. D. C. CORBIN,  
*Respondent*.<sup>1</sup>

TROVER AND CONVERSION—EVIDENCE—ADMISSIBILITY. In an action of trover for the value of property sold under attachment against a third person, evidence as to the merits of the attachment suit is irrelevant.

SAME—EVIDENCE OF PLAINTIFF'S OWNERSHIP—SUFFICIENCY. In an action for the conversion of a team, harness, wagon, and tools, under attachment proceedings against plaintiff's father, the evidence is sufficient to show ownership in the plaintiff, and it was error to dismiss the action, where it appears from uncontradicted evidence that one of the horses was given to the plaintiff by his father on his twenty-first birthday, and the other articles were purchased by him with his own money, although there was a circumstance indicating a claim of ownership made by the father.

<sup>1</sup>Reported in 93 Pac. 433.

FRAUDULENT CONVEYANCES—TRANSFER OF PERSONALTY—PLACE OF SALE—WHAT LAW GOVERNS. The statutes of Idaho relating to sales have no bearing on the question of the ownership of personal property sold in this state and afterwards removed to Idaho.

SAME—CHANGE OF POSSESSION—EXISTING CREDITORS—STATUTES—CONSTRUCTION. Bal. Code, § 4578, providing that no bill of sale for the transfer of personal property shall be valid as to existing creditors, where the property remains in the possession of the vendor, unless the same is recorded, has no application where no debts existed at the time of the sale.

Appeal from a judgment of the superior court for Spokane county, Carey, J., entered February 21, 1907, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, dismissing an action to recover the value of personal property sold under attachment proceedings. Reversed.

*George A. Latimer and Dalbert E. Twitchell*, for appellant.

*Allen & Allen*, for respondent.

DUNBAR, J.—This action was commenced by Richard Greenwood against D. C. Corbin, to recover the value of the following described personal property, to wit: One blue roan mare named Pete, one light grey mare named Doll, one set of double harness, one double wagon, one half-truck; together with damages for the detention in July, 1906. The cause was tried without a jury, and a decision rendered in favor of the defendant. From the judgment of dismissal, the appeal is taken.

The property above described came into the possession of the defendant through a suit and attachment against the partnership composed of J. I. Greenwood, father of the plaintiff, and Frank Campbell, brought by the defendant in the courts of Idaho. The property was afterwards sold by defendant by an order of the court as perishable property, and the

Jan. 1908]

Opinion Per DUNBAR, J.

money therefrom was turned in to the clerk of the said Idaho court.

At the time of said attachment the plaintiff was working for the aforesaid partnership as a teamster. An examination of the record in this case convinces us that the judgment of the court was wrong, not only in relation to some of the technical errors assigned by the appellant, but in consideration of the merits of the case; and the judgment we think was rendered by the lower court under a misapprehension of the law governing the case. The case seems to have been largely tried with reference to the merits of the original controversy between J. I. Greenwood, the father of the plaintiff, and D. C. Corbin, the defendant in this action, and a great deal of testimony was introduced with regard to that controversy; while of course the only question at issue in this case is the ownership of the property by the appellant. The introduction of testimony in relation to the merits of the former case only served to confuse and obscure the issues in this case.

We are constrained to think, from the findings of the court and the opinion of the trial judge, which is sent up in the record, that the delinquencies of the father, J. I. Greenwood, were to a certain extent visited upon the appellant in this case. Stripped of all immaterial facts, the record shows that the blue roan mare was given to the appellant by his father for a birthday present on appellant's twenty-first birthday, viz., the 7th day of July, 1905. This was testified to by the father in a straightforward manner, also by the son, and also by the mother of the appellant, who stated that they had talked the matter over, that the son had been working faithfully for them, and that they had concluded to, and did, make him a present of this mare. The record also shows by the testimony of the father and the appellant, that the grey mare was sold to the appellant by his father on the 28th day of August, 1905; that the harness was bought by the appellant from a second-hand dealer, the money for the same being

paid by the appellant with funds he received for labor while working for his father, and that the wagon was bought by the appellant from a liveryman at Spokane, with his own money. The man who sold the harness, who seems to be entirely disinterested, and who only had a casual acquaintance with the appellant and his father, testified to the sale of the harness to the son, and the payment by him for the same, and that the transaction was with the son, who told him that if he would throw in a couple of old collars he would take it at the price offered. The collars were thrown in and the trade consummated. The man who sold the wagon to the son also testified to the purchase of the same by the son. There was no attempt by any one to dispute this testimony.

A single circumstance was proven which on first thought would seem to be inconsistent with the theory of ownership on the part of the son. This circumstance was that J. I. Greenwood gave a chattel mortgage on this property to a man by the name of Root, after the time that ownership of it was claimed by the appellant, making the usual affidavit in relation to the ownership thereof. In explanation of this, however, the testimony shows, that the appellant was with his father at the time this chattel mortgage was given; that the ownership of the son in the property was made known to Mr. Root, and it was agreed that if any more money were required the son would sign the mortgage with the father. Mr. Root, however, deeming the security ample, did not require this. This was testified to not only by J. I. Greenwood and the appellant, but also by Mr. Root. It seems that there was no special attention called to the conditions of the affidavit, but that J. I. Greenwood, in a rather careless manner, signed the same and executed the mortgage. The transaction was made without the assistance of any outsider, Mr. Root having prepared the mortgage himself, and while it is a practice which is not commendable and might be fraught with serious results to parties indulging in it, under all the circumstances as shown

Jan. 1908]

Opinion Per DUNBAR, J.

by the testimony we do not think it was sufficient to overbalance the real testimony in relation to the ownership of the property.

The only other circumstance tending in any way to dispute the testimony of the appellant was that of the deputy sheriff, who testifies that, when he levied upon the property, the appellant claimed to own a certain brown team instead of the team in controversy. This was denied by the appellant, who stated that he simply told the deputy that he claimed one of the teams, not specially mentioning the team, the teams all being together at the camp where the levy was made. We think, under all the circumstances surrounding the levy and in consideration of the testimony of both parties, the deputy sheriff might easily have been mistaken as to what particular team was referred to by the appellant on that occasion.

The statutes of Idaho which were introduced, even if they had been legally introduced, have no bearing upon this question, for it is conceded that the contract of sale to this appellant, if any was made, was made prior to the time when the property was removed to Idaho, and prior to any indebtedness on the part of J. I. Greenwood to the respondent in this action. For the same reason Bal. Code, § 4578 (P. C. § 5345), which is to the effect that no bill of sale for the transfer of personal property shall be valid, as against existing creditors or innocent purchasers, where the property is left in the possession of the vendor, unless the said bill of sale be recorded in the auditor's office of the county in which such property is situated within ten days after such sale shall be made, is inapplicable, no debt existing at the time this sale and gift were alleged to have been made.

It was not inconsistent with the idea of ownership on the part of the appellant that his father gave him employment with his team upon the contract which he had taken from Mr. Corbin, nor was it inconsistent with the idea of ownership that when his father, whether justly or unjustly, left Idaho

and started for his home in Washington, he accompanied him on the trip, bringing his team with him; and whatsoever may have been the merits of the original controversy between J. I. Greenwood and the respondent Corbin, the undisputed testimony in this case in relation to the ownership of this property is so strong and convincing that, notwithstanding the judgment of the superior court on the same testimony, we cannot but deem it sufficient to establish legal ownership in the appellant.

The judgment will therefore be reversed, and the value alleged, viz., \$475, having been established by uncontradicted testimony, the court will enter judgment for the appellant for the sum of \$475, with legal interest from the date of the detention of the property.

HADLEY, C. J., ROOT, MOUNT, RUDKIN, and FULLERTON, JJ., concur.

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[No. 7019. Decided January 24, 1908.]

CHARLES J. MCOWEN, *Appellant*, v. SEATTLE ELECTRIC  
COMPANY, *Respondent*.<sup>1</sup>

NEW TRIAL—EXCESSIVE VERDICT—REMISSION. Upon a verdict for \$25,544 for damages for personal injuries, it is not error to grant a new trial unless the plaintiff would remit all sums in excess of \$6,544, where the verdict was excessive unless a substantial reduction was remitted, regardless of whether \$6,544 was too large or too small.

Appeal from a judgment of the superior court for King county, Yakey, J., entered July 23, 1907, granting to defendant a new trial, after a verdict rendered in favor of the plaintiff for \$25,544 damages for personal injuries sustained in a street car collision. Affirmed.

<sup>1</sup>Reported in 93 Pac. 518.

Jan. 1908]

Opinion Per Curiam.

*Casey & Casey (Graves, Palmer & Murphy, of counsel),*  
for appellant.

*Hughes, McMicken, Dovell & Ramsey,* for respondent.

PER CURIAM.—This was an action to recover damages for personal injuries resulting from a collision between two street cars operated by the defendant company. The amount of the damage to which the plaintiff was entitled was the only issue in the case. The jury returned a verdict in his favor in the sum of \$25,544, but on motion of the defendant the court granted a new trial unless the plaintiff would remit from the verdict all sums in excess of \$6,544. The plaintiff refused to remit, and a new trial was ordered. From this order the plaintiff has appealed.

Taking the view of the testimony most favorable to the appellant, both as to the extent of his injuries and as to the impairment of his earning capacity, we are convinced that the verdict of the jury was excessive, and that the court was amply justified in granting a new trial unless a substantial remission from the verdict was made. In view of a retrial of the case, we deem it improper to determine at this time whether the verdict as reduced by the trial court was too large or too small, and refrain from expressing any opinion on that question; but, finding no error in the record, the judgment is affirmed.

[No. 6709. Decided January 25, 1908.]

B. A. GAULT, *Respondent*, v. G. R. BRADSHAW, *Appellant*.<sup>1</sup>

**APEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.** Errors on rulings on admitting evidence are immaterial where the verdict was entered by direction of the court.

**BROKERS—CONTRACT FOR COMMISSION—ASSENT.** Where an owner listed his property with a broker and the broker stated that he would charge a commission of five per cent for effecting a sale, the owner cannot, after concluding a sale made by the agent, claim that he did not agree to the payment of the commission from the fact that he remained silent upon being told that such charge would be made.

Appeal from a judgment of the superior court for Kittitas county, Rigg, J., entered October 20, 1906, upon the verdict of a jury rendered in favor of the plaintiff by direction of the court, in an action to recover a broker's commission. Affirmed.

*O. O. Felkner*, for appellant.

*Hovey & Hale*, for respondent.

FULLERTON, J. — The respondent brought this action against the appellant to recover the sum of \$1,250 claimed to be due as a commission for the sale of certain real and personal property, made on September 10, 1904. After issue had been joined a trial was entered upon before the court and a jury, at the conclusion of which the court, on the respondent's motion, directed a verdict in his favor on the ground that there was no substantial dispute on any material question of fact, and that the facts warranted a recovery on the part of the respondent. From the judgment entered on the directed verdict, this appeal is taken.

<sup>1</sup>Reported in 93 Pac. 534.

Jan. 1908]

Opinion Per FULLERTON, J.

The appellant assigns errors on the ruling of the court made while passing upon the admissibility of evidence, but since no evidence was excluded which would throw light on the main issue, the questions become immaterial in view of the action of the court in instructing a verdict; this on the principle, so often stated by us, that on trials had before the court without a jury the erroneous admission of evidence is not ground in itself for a reversal of the judgment.

On the principal question, whether or not there was a substantial dispute in the evidence, we think the court committed no error. It is undisputed that the appellant listed his property for sale with the respondent, who was a real estate broker, at a fixed price, and that the respondent told the appellant that he would charge him a five per cent commission if he found a purchaser who would take the property at the price named. It is undisputed also that the respondent did find such a purchaser, that he sent the purchaser to the appellant, and that the appellant sold the property to the purchaser at the price he had named to the respondent. The appellant sought to escape liability by contending that he did not agree to pay the commission asked by the respondent; that although he made no reply when the respondent told him he would charge a commission, he did not thereby intend to consent to agree to pay any commission. But to make a contract the assent to this part of the agreement did not have to be expressed. By listing the property with the respondent for sale, learning the respondent's terms, and afterwards accepting the fruits of the respondent's exertion, an implied promise to pay the charge arose, and the appellant cannot now escape liability by saying that he did not intend to make such an agreement. He should have made known his reservation at the time the statement was made to him; it is too late to make it known for the first time after the respondent had performed on his part and he had received the benefits of such performance.

But without examining the evidence further we think it justified the conclusion of the trial court. The judgment will therefore stand affirmed.

RUDKIN, MOUNT, DUNBAR, and ROOT, JJ., concur.

HADLEY, C. J. and CROW, J., took no part.

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[No. 6917. Decided January 28, 1908.]

BEN H. STURGEON, *Appellant*, v. TACOMA EASTERN  
RAILROAD COMPANY, *Respondent*.<sup>1</sup>

MASTER AND SERVANT—NEGLIGENCE OF MASTER—SAFE APPLIANCES—DEFECTIVE CARS—CUSTOMARY USE OF CAR. Where a railroad company is aware of an nabitual custom of brakemen to use a cross-piece of a wood rack on a wood car for the purpose of boarding the car while it is being switched, it is the duty of the company to keep the same reasonably safe for such use, although not originally intended for that purpose.

SAME—CONTRIBUTORY NEGLIGENCE—CUSTOMARY METHODS—OPERATION OF TRAINS. A brakeman is not guilty of contributory negligence, as a matter of law, in attempting to board a wood car, while switching at the rate of one to four miles an hour, where there was evidence by trainmen of years of experience that it was customary on all railroads to board such cars in the identical manner employed by him.

SAME—DUTY TO INSPECT—RULES OF COMPANY. A railroad company cannot by rules impose upon a brakeman the duty of inspecting cars about to be switched, so as to escape liability for a defective cross-piece in a wood rack, whereby the brakeman was injured in attempting to board the car, on a dark morning, with but little opportunity to inspect cars while engaged in his other duties.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered April 18, 1907, granting a nonsuit at the close of plaintiff's case, in an action for personal injuries sustained by a brakeman while boarding a moving train. Reversed.

<sup>1</sup>Reported in 93 Pac. 526.

Jan. 1908]

Opinion Per RUDKIN, J.

*Burkey, O'Brien & Burkey*, for appellant.*E. M. Hayden and John A. Shackelford*, for respondent.

RUDKIN, J.—On, and for some time prior to, the 27th day of January, 1906, the plaintiff was in the employ of the defendant as a brakeman on one of its logging trains. Between the hours of 4 and 6 o'clock of the morning of the above date, the train on which the plaintiff was employed stopped at Nelson's Siding, on the line of the defendant's road, to take up some empty cars on a side track. There was a flatcar partly loaded with wood in front of the empties which the train was about to pick up, and in order to reach the empties the engine was backed up and attached to this wood car. The wood car was next attached to the empties and the train drawn forward onto the main track. The empties were then kicked back onto the main track and the plaintiff turned the switch in order that the wood car might be returned to its original position on the side track. As he turned the switch the plaintiff signaled the engineer to back the train onto the siding, and, as the train approached him at a speed of from one to four miles an hour, he attempted to board the wood car for the purpose of setting the brake when the car reached its proper position on the siding, by placing his left hand and left knee on the drawhead and seizing one of the cross-pieces of the wood rack with his right hand. The cross-piece thus seized was defective and gave way. In an effort to save himself the plaintiff attempted to throw himself clear of the train, but his left foot was caught and crushed. This action was brought to recover damages for the injury thus received. At the close of the plaintiff's case the court directed a nonsuit, and from the judgment of nonsuit the present appeal is prosecuted.

Under the facts thus presented two questions arise: (1) Was there testimony tending to show negligence on the part of the respondent; and (2) was the appellant guilty of con-

tributory negligence as a matter of law. The respondent contends that the wood rack in question was not intended for use as a ladder by trainmen in boarding cars, but there was no testimony on this point. On the other hand, trainmen of years of experience testified that it is customary, not only on respondent's road but on all railroads, for brakemen to board cars such as this in the identical manner in which the appellant attempted to board the car in question. If this custom prevailed and was known to the respondent, or should have been known by the exercise of reasonable diligence, it became its duty to make its wood racks reasonably safe for the purpose for which they were habitually used, regardless of the purpose they were originally intended to subserve. *Wallace v. Seaboard Air Line R. Co.*, 141 N. C. 646, 54 S. E. 399; *Dunn v. New York etc. R. Co.*, 46 C. C. A. 546, 107 Fed. 666; *Babcock Brothers Lumber Co. v. Johnson*, 120 Ga. 1030, 48 S. E. 438.

There is some controversy between counsel with reference to the testimony relating to the condition of the cross-piece which gave way and caused the appellant's injury. While we must accept the record as certified to this court, we are satisfied that the testimony on this point was not correctly reported. Sometimes counsel and the witness are made to refer to the *brake* on the car and sometimes to the *break* in the cross-piece. To a certain extent the testimony is unintelligible, but it is apparent that some of the testimony at least referred to the break in the cross-piece on the wood rack, and that the appellant testified that the break was an old one. From the entire record the jury would have been warranted in finding that it is customary for trainmen to use the cross-pieces on the wood racks in boarding cars such as this in the manner in which the cross-piece in question was used by the appellant; that this custom was known to the respondent; that the cross-piece or wood rack was not reasonably safe for that purpose, and that its defective and unsafe condition could

Jan. 1908]

Opinion Per RUDKIN, J.

have been ascertained by the respondent by the exercise of reasonable diligence and proper inspection.

Was the appellant guilty of contributory negligence? The respondent contends that he was for two reasons; first, in attempting to board a moving train in the manner in which he did; and second, because he failed to inspect the car as required by the rules of the company. It certainly cannot be said, as a matter of law, that a brakeman is guilty of negligence if he attempts to board a moving train. The testimony shows clearly that such is the common custom, and it is perhaps not going too far to say that the existence of such a custom is a matter of common knowledge. *Prosser v. Montana Cent. R. Co.*, 17 Mont. 372, 43 Pac. 81, 30 L. R. A. 814.

The rule of the company which imposed the duty of inspection on the appellant is as follows: "672 (a) Brakemen report to trainmaster, assistant superintendent, or superintendent, and obey the conductor, with whose duties they will become familiar and assist in performing." Other rules impose the duty of inspection on conductors, and it is contended that the above rule imposes a like duty on brakemen. It must be apparent that a brakeman on a dark morning has but little opportunity to inspect cars while engaged in the discharge of his other duties, and a railroad company cannot avoid liability to its employees by imposing upon them the duty of inspection, unless a reasonable opportunity is given for the discharge of that duty.

"A master cannot shift upon his employees his responsibility to them for injuries resulting from defects due to wear and tear, by devolving upon them the duty of inspection, unless they are given time and opportunity to make such inspection, as would reveal the defects. And this may be said to be the effect of the decisions. It is considered that such rules should receive a reasonable interpretation, and that the obligations of the servant should be determined with reference both to the character of the defect and to his ability to make an examination. Upon this basis the validity of rules or agreements of the ordinary tenor by which servants are obligated

to examine appliances may often be upheld. But if they are couched in terms which indicate a clear and absolute intention on the employer's part to impose a more extensive obligation upon the servant than is thus declared to be permissible, they will be treated—by most courts at all events—as an illegal attempt to subject the latter to the duty which is incumbent upon the former, of seeing that the plant is in a reasonably safe condition." 1 Labatt, Master and Servant, p. 1178.

See, also, *Matchett v. Cincinnati etc. R. Co.*, 132 Ind. 334, 31 N. E. 792; *Strong v. Iowa Central R. Co.*, 94 Iowa 380, 62 N. W. 799; *Holmes v. Southern Pac. R. Co.*, 120 Cal. 357, 52 Pac. 652.

On the entire record we are of opinion that the question of negligence on the part of the respondent and of contributory negligence on the part of the appellant should have been submitted to the jury under proper instructions, and for the court's failure so to do the judgment is reversed and a new trial ordered.

HADLEY, C. J., DUNBAR, and FULLERTON, JJ., concur.

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[No. 6030. Decided January 29, 1908.]

SPOKANE STAMP WORKS, *Respondent*, v. WILLIAM M.  
RIDPATH, *Appellant*.<sup>1</sup>

INJUNCTION—ACTIONS FOR—AGAINST ABATEMENT OF NUISANCE—EVIDENCE—SUFFICIENCY. It is error to grant an injunction against the abatement by a landlord of a nuisance on leased premises, where it appears that the tenant was maintaining a nuisance by the operation of heavy, noisy machinery in a storeroom of a hotel which jarred the building and disturbed the guests of the hotel in a manner not contemplated by the lessor, the lease giving no such right, and the burden of proof being on the plaintiff to show authority for such operation.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered March 22, 1907, granting a per-

<sup>1</sup>Reported in 93 Pac. 533.

Jan. 1908]

Opinion Per Curiam.

manent injunction, in an action to restrain the abatement of a nuisance upon premises used as a hotel. Reversed.

*Henley & Kellam*, for appellant.

*John C. Kleber*, for respondent.

PER CURIAM.—The subject-matter of this action may be understood by reference to the facts stated and discussed in *Ridpath v. Spokane Stamp Works*, ante p. 320, 93 Pac. 416. It was held by the trial court in that case that the testimony offered by the plaintiff was not sufficient for the jury, and a nonsuit was granted. This court held that the testimony concerning the operation of the stamp machinery upon the premises showed upon its face the existence of a nuisance in a building that was chiefly used as a hotel, and such as the owner had a right to have abated. It was held that the trial court erred in granting the nonsuit, and the cause was remanded with instructions to proceed with the trial. The parties are reversed in this action. The Stamp Works Company brought this suit against the owner to restrain him from removing the upright log or the piece of timber extending from the ground in the basement up through the first floor, and upon which the stamp falls as the result of operating the machinery; and also to restrain him from cutting the power wires leading to the machinery. A permanent injunction was granted, and the owner has appealed.

Testimony was introduced by both parties in this case, and after having read the record thereof, we are convinced that the facts show the maintenance by respondent of a nuisance upon appellant's premises. The written lease between the parties gives no leave to maintain any such noisy and jarring machinery, and the claim of right to maintain it is based merely upon alleged oral conversations said to have occurred, some before and some after the execution of the written lease. The evidence, however, convinces us that the owner at no time correctly understood what would be the effect of this

machinery in its operation, and that he, from the beginning and at all times, expressly protested against the installation of appliances that would be noisy or that would in any manner disturb the occupants of the hotel. He was, however, led by respondent's agents to believe that the appliances they were installing would not have such effect, and while he warned them that noisy machinery would not be tolerated, yet he did not absolutely object to the installation of this particular machinery.

We think the evidence shows that, by the use of the log and power for operating the stamp thereon, respondent is using and affecting the premises in a manner never contemplated by the owner and to which he never consented. There was conflict in the evidence, but the burden was upon respondent to establish by a preponderance of the testimony that it was maintaining and operating this machinery by authority of the owner, having in view all the peculiar phases of its operation and the effect thereof. This we think respondent has not done, and inasmuch as the action is triable *de novo*, here, we so find.

It was therefore error to grant respondent an injunction, and the judgment is reversed, and the cause remanded with instructions to dismiss the action.

Jan. 1908]

Opinion Per Curiam.

[No. 7077. Decided January 30, 1908.]

**Z. B. TAYLOR, Respondent, v. G. DEBRITZ et al., Appellants.**<sup>1</sup>

**TAXATION—PAYMENT—OMISSION OF TAXING OFFICERS.** A tax sale and deed thereunder is void, where the owner in good faith applied to the proper officers for a statement of the taxes due, paid all that was demanded, and full payment was prevented by the mistake or fault of the officers.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 30, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to vacate tax foreclosure proceedings. Affirmed.

*Ralph Simon*, for appellants.

*Hayden & Langhorne*, for respondent.

**PER CURIAM.**—This was an action to set aside a tax deed based on the foreclosure of a delinquency certificate for the taxes of 1888. From a judgment in favor of the plaintiff the defendants have appealed.

The testimony introduced at the trial showed, and the court found:

“That after purchasing said land, beginning with the year 1889 and each and every year thereafter, plaintiff requested from the proper collecting officers of King county statements of the taxes due as well as the taxes delinquent against said land. That each and every year since the purchase of said land, beginning with the year 1889, the proper collecting officers of King county asserted and represented to the plaintiff by written and verbal statement that there were no taxes unpaid or delinquent against said land, except such taxes as this plaintiff had theretofore paid. That this plaintiff has paid the taxes on said land beginning with the taxes assessed for the year 1889 down to and including the taxes assessed for the year 1906.”

<sup>1</sup>Reported in 93 Pac. 528.

Considering a similar state of facts in the recent case of *Bullock v. Wallace*, 47 Wash. 690, 92 Pac. 675, this court quoted the following from the 27 Am. & Eng. Ency. Law (2d ed.), p. 755:

"If the owner of land, or a party having an interest therein, in good faith applies to the proper officer for the purpose of paying the tax thereon, and payment is prevented by the mistake or fault of such officer, . . . the attempt to pay is considered, in most jurisdictions, as the legal equivalent of payment in so far as to discharge the lien and bar a sale for payment;"

and said:

"The facts, we think, require the holding that the foreclosure was unauthorized in law, that the sale and deed thereunder were void, and that appellant was not divested of her title thereby."

To the same effect see *Loving v. McPhail*, ante p. 113, 92 Pac. 944. On the authority of the above cases the judgment in this case must be affirmed, and it is so ordered.

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[No. 6967. Decided January 30, 1908.]

T. J. DONALDSON *et al.*, Respondents, v. JOHN W.

WINNINGHAM *et al.*, Appellants.<sup>1</sup>

GUARDIAN AND WARD—APPOINTMENT—INSANE PERSONS—NECESSITY OF ADJUDICATION OF INSANITY. In the absence of fraud or conspiracy, the superior court has jurisdiction to appoint a guardian for an insane person irrespective of a prior adjudication of insanity, which is accordingly irrelevant on the question of the validity of the guardianship proceedings.

JUDGMENT—COLLATERAL ATTACK. In an action to quiet title acquired at a judicial sale, a cross-complaint by the former owner attacking the validity of the order or judgment of sale, is a direct and not a collateral attack on the order or judgment, in which the jurisdiction of the court to make the order may be inquired into.

<sup>1</sup>Reported in 93 Pac. 534.

Jan. 1908]

Opinion Per RUDKIN, J.

**GUARDIAN AND WARD—APPOINTMENT—INSANE PERSONS—NECESSITY OF NOTICE—SALE OF PROPERTY.** Service of notice of the application for the appointment of a guardian of an insane person, upon the person having the care and custody of the insane person, is a jurisdictional prerequisite to an order of sale of such insane person's real property.

**HOMESTEAD—DECLARATION—NECESSITY.** Under Laws 1895, p. 109, there is no homestead right in property acquired since the passage of the act unless a declaration of homestead is executed and filed as therein required.

Appeal from a judgment of the superior court for King county, Albertson, J., entered May 18, 1907, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to quiet title. Reversed.

*J. H. Allen and M. M. Winningham, for appellants.*

*H. E. Foster, for respondents.*

**RUDKIN, J.**—The defendants acquired the property in controversy on the 2d day of January, 1902, and occupied the same as their home until the 10th day of January, 1905. On the latter date the defendant Maggie M. Winningham was adjudged insane by the superior court of King county and committed to the Western Washington Hospital for the Insane at Fort Steilacoom. On the 2d day of March, 1905, the defendant John W. Winningham was appointed guardian of the person and estate of the defendant Maggie M. Winningham, by the same court. On the 18th day of May, 1905, the defendant John W. Winningham, for himself and as guardian of the person and estate of his codefendant Maggie M. Winningham, conveyed the property to one William Winningham, pursuant to an order of the superior court made and entered in the guardianship matter, and William Winningham in turn conveyed to the plaintiffs. The present action was instituted by the plaintiffs to quiet their title as against the Winnings. The court made findings and granted

judgment according to the prayer of the complaint, and the defendants have appealed therefrom.

The appellant Maggie M. Winningham, by cross-complaint, attacked the regularity and validity of the insanity proceedings as a result of which she was adjudged insane and committed to the hospital for the insane, the regularity and validity of the guardianship proceedings, and the regularity and validity of the order of sale, on the above grounds, and on the further ground that the property was a homestead. The respondents contend that the cross-complaint was a collateral attack on the orders or judgments in the insanity and guardianship proceedings. We may say here that the insanity proceedings have no place in this record. The superior court has jurisdiction to appoint guardians for insane persons wholly independent of its jurisdiction to commit to hospitals for the insane, and the validity of the order appointing the guardian depends in no manner upon the validity of the previous adjudication of insanity. If fraud or conspiracy were charged a different rule might apply, but no such claim is advanced here. Is this a collateral attack on the guardianship proceedings? We think it is settled by the decisions of this court that where an action is brought against the former owner, to recover property or quiet a title acquired at a judicial sale, a cross-complaint by such former owner attacking the validity of the order or judgment under which the sale was made is a direct and not a collateral attack on such order or judgment. *Christofferson v. Pfennig*, 16 Wash. 491, 48 Pac. 264; *Krutz v. Isaacs*, 25 Wash. 566, 66 Pac. 141; *Northwestern etc. Bank v. Ridpath*, 29 Wash. 687, 70 Pac. 139.

We do not mean by this that mere errors or irregularities not going to the jurisdiction of the court may be inquired into under such a cross-complaint, for these can only be corrected on a direct appeal, or in a case such as this by an appropriate proceeding instituted by the insane person within

Jan. 1908]

Opinion Per RUDKIN, J.

one year after the disability is removed. But the jurisdiction of the court to make the order under which the sale was made may be inquired into, and the service of notice of the application for the appointment of a guardian upon the insane person, and upon the person having the care, custody, and control of such insane person, as required by the act of March 16, 1903, Laws 1903, page 242, is jurisdictional, and if no such notice was served all subsequent proceedings are null and void. *State ex rel. Lowary v. Superior Court*, 41 Wash. 450, 83 Pac. 726.

This in our opinion is the only jurisdictional question raised by the cross-complaint or the offer of proof. The question of the sale of a homestead does not arise in this case. While it was held in *Curry v. Wilson*, 45 Wash. 19, 87 Pac. 1065, that there was no authority in law for the sale or mortgage of the homestead of an insane person in this state prior to the passage of the homestead act of March 30, 1895, Laws of 1895, page 109—and there is no pretense that the provisions of that act were complied with here—yet in the case of *Whitworth v. McKee*, 32 Wash. 83, 72 Pac. 1046, it was held that there is no homestead right in property acquired since the passage of the act of 1895, *supra*, unless the declaration of homestead is executed and filed as therein provided. The property in controversy was acquired since the passage of that act, and the appellants concede that no declaration of homestead was executed or filed. This disposes of all of the assignments of error, and for the error in excluding testimony tending to show that no notice of the application for the appointment of a guardian was given or served, the judgment is reversed and a new trial ordered.

If on a retrial it should appear that no such notice was given or served, the court will take an accounting between the parties and enter judgment quieting title in the appellants on such terms as may be equitable. If it shall appear that

such notice was in fact given, judgment will go for the respondents.

HADLEY, C. J., FULLERTON, DUNBAR, MOUNT, CROW, and ROOT, JJ., concur.

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[No. 6693. Decided January 30, 1908.]

*In The Matter of The Estate of MARTHA J. HOLBURTE,  
Deceased.*

W. A. WILSON, *Appellant*, v. H. H. McMILLAN, *Executor  
of the Estate of Martha J. Holburte, Deceased,  
Respondent.*<sup>1</sup>

EXECUTORS AND ADMINISTRATORS—SALES—CONFIRMATION—VACATION—IRREGULARITIES. Where, pending confirmation of an inadequate bid at an executor's sale, an upset bid was made, misleading the executor to think that the sale would not be confirmed, withdrawal of the upset bid and confirmation of the sale without notice to the executor, at a time when higher bids were available, constitutes an irregularity warranting vacation of the order of confirmation.

Appeal from an order of the superior court for Lincoln county, Warren, J., entered November 13, 1906, in favor of the defendant, vacating the confirmation of a sale of real property made in probate proceedings. Affirmed.

*W. A. Wilson, pro se.*

*H. A. P. Myers, for respondent.*

ROOT, J.—This is an appeal from an order setting aside the confirmation of a sale of real estate made in a probate proceeding. The record shows that the sale of the property involved was first advertised for June 16, 1906, but there being no bidders, the sale was postponed until June 23, 1906. At the sale the property was bid in by the appellant for

<sup>1</sup>Reported in 93 Pac. 529.

Jan. 1908]

Opinion Per Root, J.

\$1,000, he being the only bidder. On June 30, 1906, the executor made his return, setting forth among other things "that the sum of \$1,000 is much less than the value of said property, but the undersigned was unable to get any other bid for the same," and recommending the confirmation of the sale. Thereupon some of the heirs of the deceased objected to the confirmation, and with their objections a written offer by one H. N. Martin was filed, wherein he agreed in case of a resale to bid at least ten per cent over and above the \$1,000, and pay the expense of such resale. The matter was continued from time to time until October 24, 1906, when Martin requested permission to withdraw the objections and his offer to bid over \$1,000 at a new sale. The request was granted, and the bid and objections were withdrawn. The appellant then, without notice to the respondent or his counsel, presented an order of confirmation to the judge of the court, who signed the same. The executor, immediately upon learning of this, moved to vacate said order, as it had been made without his knowledge and at a time when he was able to secure a larger sum for the property. This motion was granted, and it is from this order that the present appeal is prosecuted.

It is contended by appellant that the order of confirmation could not be set aside by the trial court in the absence of a showing of fraud or irregularity in the obtaining thereof, and that none such appears in this instance. We think there was an irregularity, and one which would approximate constructive fraud upon the estate. The "upset" bid interposed by Martin would naturally lead the executor and heirs to believe that no confirmation of the sale was to be had. When this was withdrawn and an order of confirmation taken without any notice to the executor, and at a time when higher bids were available, we think the condition of affairs existed which justified the trial court in vacating the order of confirmation thus made. Ofttimes probate proceedings, or numerous steps

therein, are largely *ex parte*, and considerable latitude is accorded by law to the court which has supervision of such matters, to the end that the best interests of the estate may be subserved.

Finding no error in the action of the court in making the order appealed from, the same is affirmed.

HADLEY, C. J., CROW, and DUNBAR, JJ., concur.

FULLERTON and MOUNT, JJ., took no part.

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[No. 7076. Decided January 31, 1908.]

JOHN N. PERKINS, *Respondent*, v. JOHN PEIRCE *et al.*,  
*Appellants*.<sup>1</sup>

APPEAL—PARTIES—JOINDER—NOTICE—DISMISSAL. An appeal will be dismissed as to a coparty, where the record fails to show that he joined in the notice of appeal, or that he filed any appeal bond, and no brief was filed in his behalf.

PARTNERSHIP—CONTRACTS—INDIVIDUAL LIABILITY. A member of an alleged copartnership, who signed a contract of employment, is liable thereon, whether or not the partnership existed or he had authority to execute the contract for the partnership, as between the parties to the contract, when the rights of the alleged copartners were not before the court.

Appeal from a judgment of the superior court for King county, Griffin, J., entered April 20, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on a contract of employment. Affirmed.

*Jerold Landon Finch*, for appellant Evans.

RUDKIN, J.—This action was instituted against the defendants as copartners to recover for services performed by the plaintiff at the instance and request of the defendants in

<sup>1</sup>Reported in 93 Pac. 525.

Jan. 1908]

Opinion Per RUDKIN, J.

procuring options for certain timber lands, and in placing the defendants in communication with the owners thereof, to the end that deeds might be obtained therefor. Trial was had before the court without a jury. The court found that the defendants were copartners as alleged; that on the 21st day of March, 1905, they employed the plaintiff to procure options on certain timber lands in Clallam county, agreeing to divide with him the difference between the price paid per quarter section and \$1,800, which was modified to \$1,600 per quarter section on October 28, 1905; that the defendant Evans in entering into the contract of employment acted for himself and his codefendant Peirce; that pursuant to his contract of employment the plaintiff obtained options on five quarter sections and one eighty-acre tract, at the agreed purchase price of \$1,000 per quarter section; that the defendants and their appointee obtained title to all of said lands; that the plaintiff has received nothing on account of his services in that behalf; and entered judgment accordingly. From this judgment the defendant Evans has appealed.

He states in his brief that his codefendant Peirce joined in the appeal, but no notice of such joinder and no appeal bond appears in the record, and no brief has been filed. As to the appellant Peirce, therefore, the appeal, if any, must be dismissed, and it is so ordered.

Much of the argument of the appellant is addressed to the question of the existence of a partnership between himself and his codefendant Peirce, but insofar as the rights of the appellant are concerned, we do not deem that question material. The contract of employment was entered into and signed by the appellant, and whether there was a copartnership, or whether the appellant was authorized to act for or bind his codefendant, is not an issue on this appeal. The court found that the contract was entered into by the appellant and the respondent, that the respondent performed his part of the contract and has not been paid the stipulated compensation

for his services. These findings are sustained by the testimony and the judgment against the appellant was proper, partnership or no partnership, the rights of the defendant Peirce not being before this court. 15 Ency. Plead. & Prac., 960.

The judgment is therefore affirmed.

HADLEY, C. J., FULLERTON, ROOT, DUNBAR, MOUNT, and CROW, JJ., concur.

[No. 7134. Decided January 31, 1908.]

PORT TOWNSEND SOUTHERN RAILROAD COMPANY,  
*Respondent*, v. DENNIS NOLAN *et al.*,  
*Appellants*.<sup>1</sup>

EVIDENCE—OPINIONS—MARKET VALUE. The owner of premises is not always competent to testify as to the market value of his real property.

APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE. It is not prejudicial error to refuse to allow an owner of a town lot to testify to its market value, where the testimony as to his knowledge and qualifications was extremely contradictory, and seven or eight other witnesses better qualified testified in his behalf.

SAME—REVERSAL NOT BENEFICIAL—CESSATION OF CONTROVERSY. In condemnation proceedings, the defendant cannot allege error in that he was not allowed to show that his saloon license was rendered valueless by the appropriation, where pending appeal the license expired and he had received the benefit of it; since the controversy as to that had ceased before the hearing.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered May 20, 1907, after a hearing on the merits, decreeing the appropriation of property in a condemnation proceeding. Affirmed.

Walter M. Harvey and Vance & Mitchell, for appellants.  
B. S. Grosscup and A. G. Avery, for respondent.

<sup>1</sup>Reported in 93 Pac. 528.

RUDKIN, J.—This is an appeal from a decree of appropriation in a condemnation case. But two errors are assigned. First, the refusal of the court to permit the appellant to testify to the market value of the property sought to be appropriated; and second, the refusal to admit evidence of the loss sustained through the appropriation of the property by taking and rendering valueless the saloon license issued to the appellant by the town of Tenino. In support of the first assignment it is contended: (1) That the owner is always competent to testify to the value of his own property; and (2) that in any event the appellant showed that he was duly qualified in this case.

With the first contention we cannot agree. The owner who occupies his property and is familiar with its character and the purposes for which it may be used, and to a greater or less extent with land values in the community, is a competent witness. But the owner may have acquired his property by devise or descent in a distant state or country and know nothing of its location, quality, condition or value, and in such cases it is idle to contend that he is competent to testify to its value or to any other fact concerning it. While, therefore, the owner may, and often does, occupy a different position towards his property than does a mere stranger, yet, he must in all cases show at least some qualification before testifying to its value, and the difference between the qualifications required of the owner and of a stranger is one of degree only. On the showing made in this case, we think the court might have permitted the owner to testify to the market value of the land taken, but the testimony as to his knowledge and qualification was extremely contradictory, and we are not prepared to say that the court abused the wide discretion which is necessarily vested in it by law. Furthermore, the property sought to be condemned was a town lot; its value depended largely upon its size and location, and the opportunities of the owner for knowing its market value were little if any

better than those of any other person familiar with land values in the town. Seven or eight witnesses, whom the court deemed better qualified than the appellant, testified to the market value of the property in his behalf, and under such circumstances we do not think that the ruling of the court was prejudicial.

On the second assignment little need be said. The saloon license has expired by operation of law. The appellant has enjoyed the full benefit of it pending his appeal, and, should the judgment be reversed, the license could not become an issue on a retrial or enter into the question of damages. As to that question the subject-matter of the controversy has ceased to exist and no benefit could accrue to the appellant from a reversal of the judgment.

Finding no substantial error in the record the judgment is affirmed.

HADLEY, C. J., FULLERTON, ROOT, DUNBAR, MOUNT, and CROW, JJ., concur.

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[No. 7071. Decided February 5, 1908.]

L. M. HIDDEN *et al.*, *Respondents*, v. GERMAN SAVINGS AND LOAN SOCIETY, *Appellant*.<sup>1</sup>

ACCORD AND SATISFACTION — PART PAYMENT — CONSIDERATION — ESTOPPEL. Where a mortgagee deemed himself insecure by reason of large accumulations of overdue interest, and agreed to remit a portion of the interest and reduce the rate thereafter in consideration of payment of a part of the interest then due, he cannot, after accepting the payment, and after the lapse of three years and the acceptance of interest at the reduced rate, assert the invalidity of the original agreement for want of consideration.

CHATTEL MORTGAGES—EXPENSE OF INSURANCE—TENDER. Where a chattel mortgage contained no provision requiring the mortgagors to keep the property insured, and there was no collateral agreement to that effect, a tender of the amount due the mortgagee need not include the expense of insurance procured by him.

<sup>1</sup>Reported in 93 Pac. 668.

Feb. 1908]

Opinion Per RUDKIN, J.

TENDER — BILLS AND NOTES — MEDIUM OF PAYMENT — ESTOPPEL.  
Where tender of a draft of the amount due on a note payable in gold coin is not objected to at the time upon that ground, it cannot afterwards be urged that the tender was insufficient because not made in gold.

Appeal from a judgment of the superior court for Clarke county, McCredie, J., entered April 4, 1907, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to cancel a promissory note and a mortgage. Affirmed.

*Milton W. Smith*, for appellant.

*H. W. Arnold*, for respondents.

RUDKIN, J.—On the 25th day of April, 1898, O. M. Hidden, Margaret Hidden, L. M. Hidden, Mary Hidden, and Arthur W. Hidden executed their promissory note in favor of the defendant, the German Savings and Loan Society, for the sum of \$20,000, payable five years after date, with interest from date until paid at the rate of 7 per cent per annum, payable quarterly. On the same date, for the purpose of securing the payment of the promissory note according to its terms, the makers executed and delivered to the payee their indenture of mortgage on certain hotel property owned by them in the city of Vancouver, Clarke county. On the 21st day of February, 1898, the makers executed and delivered to Louis J. Goldsmith, as trustee, a chattel mortgage on the furniture and fixtures in the hotel situated on the lots covered by said first mentioned mortgage as additional security for the payment of \$2,727.02, overdue interest on the loan. On the 1st day of January, 1902, interest was overdue and unpaid on the principal note to the amount of \$4,947.88, and on or about that date the defendant agreed to accept the sum of \$3,447.88 in full of all interest to January 1, 1902, and to reduce the rate of interest to five per cent per annum thereafter, on condition that the back interest was promptly paid. The plain-

tiff accepted the offer and paid the amount specified on the 27th day of January, 1902, receiving from the defendant a receipt acknowledging payment in full of all interest to January 1, 1902, as agreed. For upwards of three years thereafter the plaintiffs promptly paid the interest on the loan at the reduced rate and the defendant accepted such payments, receipting in full for all interest accruing during the periods covered by the respective payments. On June 8, 1905, \$10,000 was paid on the principal of the note, and on October 30, 1905, the further sum of \$10,131.94 was tendered by draft, in full of the balance on the principal sum due and all accrued interest to that date at the reduced rate agreed upon by the parties. The tender was rejected, and the present action was thereafter instituted to cancel the note and mortgage, and for other relief.

The complaint alleged that the plaintiffs were the successors in interest to the original mortgagors and this allegation was denied by the answer, but in view of the conclusion we have reached on the merits of the case, this question becomes immaterial. The court below made findings in favor of the plaintiffs and gave judgment according to the prayer of the complaint. From the judgment so rendered the defendant has appealed.

While the appellant rejected the tender of October 30, 1905, for the reason that the respondent refused to repay certain sums paid out by the appellant for insurance on the personal property covered by the chattel mortgage above referred to, at the trial in the court below, and again in this court, it contended that the tender was insufficient for the following reasons: First, because the agreement of January 1, 1902, to accept a lesser amount in full satisfaction of the interest then overdue was without consideration; second, because the respondent failed to tender the amounts paid out by the appellant for insurance on the personal property covered by the chattel mortgage; and, third, because the note

called for payment in gold coin at San Francisco, and the tender by draft was not in accordance with the agreement of the parties. Other minor questions are discussed in the briefs, but we find them without merit.

With these several contentions we cannot agree. (1) At the time the appellant agreed to remit the sum of \$1,500 from the amount of the unpaid interest, both principal and interest were long overdue. At that time it doubtless deemed itself insecure, else the remission would not have been made. The respondents were then at liberty to suffer the mortgage to go to a foreclosure and permit the appellant to recover its indebtedness as it then stood as best it could. But in reliance on the promise made, the respondents continued in possession of the property and paid not only the overdue interest which they were already obligated to pay but additional interest under the modified agreement to the amount of more than \$3,000. This interest was accepted by the appellant, and the agreement of January 1st, 1902, was fully acquiesced in by both parties until a dispute arose between them over the payment of certain insurance premiums. After the respondents had thus changed their position, and after the agreement had thus been executed and acquiesced in for such a length of time, it certainly does not lie with the appellant to say that the original agreement was without consideration or void. (2) The chattel mortgage contained no provision requiring the mortgagors to keep the property insured, or authorizing the mortgagee to procure insurance at their expense. The court below found that there was no collateral agreement to that effect, and such finding is sustained by the testimony. (3) While the note required payments to be made in gold coin at the appellant's office in San Francisco, the tender was not refused because not so made, and this requirement of the contract was not insisted upon in the case of any prior payment. Under such circumstances it would be highly inequi-

table to permit such a technical objection to be raised or suggested for the first time by answer.

Finding no error in the record the judgment is affirmed.

HADLEY, C. J., FULLERTON, DUNBAR, MOUNT, CROW, and ROOT, JJ., concur.

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[No. 7084. Decided February 5, 1908.]

MARION V. VAN HORN, *Appellant*, v. ROSS H. VAN HORN,  
*Respondent*.<sup>1</sup>

DIVORCE—TEMPORARY ALIMONY—ALLOWANCE BY FOREIGN COURT—ENFORCEMENT. An action does not lie in this state to recover temporary alimony upon an order therefor made in an action of divorce in another state, although appealable as a final order under the laws of such state; since it is subject at all times to modification in the foreign court.

Appeal from a judgment of the superior court for King county, Tallman, J., entered July 12, 1907, upon sustaining a demurrer to the complaint, dismissing an action to modify a foreign order granting temporary alimony pending divorce proceedings. Affirmed.

*William B. Allison*, for appellant.

*Bamford A. Robb*, for respondent.

RUDKIN, J.—This action was instituted in the court below on an interlocutory order of the superior court of Alameda county, in the state of California, awarding temporary alimony and suit money to the plaintiff herein, in an action for divorce pending in that court. A demurrer interposed to the amended complaint was sustained, and the plaintiff electing to stand on her complaint and refusing to plead further, a

<sup>1</sup>Reported in 93 Pac. 670.

Feb. 1908]

Opinion Per RUDKIN, J.

judgment of dismissal was entered. From that judgment the present appeal is prosecuted.

The order on which the action is based was made under § 137 of the Civil Code of California, which reads as follows:

"When an action for divorce is pending, the court may, in its discretion, require the husband to pay as alimony, any money necessary to enable the wife to support herself and her children, or prosecute or defend the action."

The authorities very generally agree that an action will not lie in another court or in the courts of another state on an order or judgment such as this. *Baugh v. Baugh*, 4 Bibb. (Ky.) 556; *Ledyard v. Brown*, 39 Tex. 402; *Vine v. Vine*, 21 R. I. 190, 42 Atl. 871; *Cutler v. Cutler*, 88 Ill. App. 464; *Webb v. Buckelew*, 82 N. Y. 555; *Lynde v. Lynde*, 162 N. Y. 405, 56 N. E. 979, 76 Am. St. 332, 48 L. R. A. 679; *Id.*, 181 U. S. 183, 21 Sup. Ct. 555, 45 L. Ed. 810; *Freund v. Freund* (N. J.), 63 Atl. 756; *Israel v. Israel*, 148 Fed. 576; *Hunt v. Monroe* (Utah), 91 Pac. 269; *Sistare v. Sistare* (Conn.), 66 Atl. 772; *Geisler v. Geisler*, 30 Ky. Law 430, 98 S. W. 1023; *Barclay v. Barclay*, 184 Ill. 375, 56 N. E. 636, 51 L. R. A. 351.

The reason for the rule is thus stated in *Israel v. Israel*, *supra*:

"The decree for alimony may be changed from time to time by the chancellor and there may be such circumstances as would authorize the chancellor to even change the amount to be paid by the husband, where he is in arrears in payments required under the decree. . . . The peculiar character of the obligation is such that it is always subject to modification by the court in which the decree was entered according to the varying circumstances of the parties, and no other court could undertake to administer the relief to which the parties are entitled except that having jurisdiction in the original suit. An attempt to do so by such other court would bring about a conflict of authority and a condition of chaos with reference to questions of this character, because no other court would have before it the facts with reference to such

change in conditions and as to such original right of the parties." *Barclay v. Barclay, supra*.

Without questioning the rule announced in these cases, counsel for the appellant earnestly insists that the order in question is a final one under the decisions of the supreme court of the state of California, and must be so considered here. In support of this contention he cites: *Sharon v. Sharon*, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709; *Hite v. Hite*, 124 Cal. 389, 57 Pac. 227, 71 Am. St. 82, 45 L. R. A. 793; *Baker v. Baker*, 136 Cal. 302, 68 Pac. 971.

While the supreme court of California holds in the cases cited that an order such as this is a final order from which an appeal will lie under its statutes, it does not hold, and has not held to our knowledge, that such an order is not subject to change or modification in the discretion of the court in which it was made, and this is the principal objection to permitting an action to be maintained on such an order in another jurisdiction. It is a significant fact that while the supreme court of California cites *Lochnane v. Lochnane*, 78 Ky. 467, and *Blake v. Blake*, 80 Ill. 523, in support of the right of appeal in the *Sharon* case, the courts of both of these states hold that an action will not lie on such an order. *Cutler v. Cutler*, and *Geisler v. Geisler, supra*.

Finding no error in the record, the judgment is affirmed.

HADLEY, C. J., FULLERTON, MOUNT. CROW. and DUNBAR, JJ., concur.

Feb. 1908]

Opinion Per Curiam.

[No. 8919. Decided February 5, 1908.]

ROBERT TIPTON, *Appellant*, v. J. H. ROBERTS *et al.*,  
*Respondents*.<sup>1</sup>

LANDLORD AND TENANT—RECOVERY OF POSSESSION—ACTIONS—PLEADING—ANSWER OF PAYMENT. In an action of unlawful detainer against a tenant, an answer is not demurrable as pleading a counterclaim, but in effect pleads payment of rent, where it alleges an agreement on the part of the landlord to make certain repairs, a failure on his part to do so, the making of the repairs and paying therefor by the defendants, and payment of the balance of the rent after deducting the cost of the repairs, and that the checks given in payment of rent were retained by the plaintiff for two months and until after commencement of the action.

SAME—EVIDENCE OF PAYMENT—SUFFICIENCY. In an action of unlawful detainer against a tenant for nonpayment of rent, a finding of full payment is supported by evidence that all rents due were paid, less the amount paid for repairs which the landlord had agreed to pay, and that a receipted bill for the repairs was given to and retained by the landlord's agent.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered April 4, 1907, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action of unlawful detainer. Affirmed.

*Alfred M. Craven*, for appellant.

PER CURIAM.—This is an action for an alleged unlawful detention of real estate. The defendants concededly occupied the premises as tenants of the plaintiff until November 1, 1906. By the terms of the lease the rent was payable monthly on the 1st day of each month, and the complaint alleges that it was so paid until the said 1st day of November, when default was made. It is alleged that notice in writing was given to defendants, requiring them to pay the rent or

<sup>1</sup>Reported in 93 Pac. 906.

surrender the premises, neither of which things has been done. The failure to pay rent is denied by the defendants. The cause was tried by the court without a jury, and resulted in a judgment dismissing the action, from which the plaintiff has appealed.

It is contended that the court erred in overruling appellant's demurrer to the affirmative defense. The demurrer was interposed upon the theory that the respondents had attempted to plead a counterclaim, which cannot be done in an action for unlawful detainer, within the decision in *Phillips v. Port Townsend Lodge*, 8 Wash. 529, 36 Pac. 476. The court overruled the demurrer upon the theory that the legal effect of the facts alleged was that of an allegation of payment or tender. We think there was no error in this regard. The allegations were, that the house needed repairing in the way of papering some rooms; that appellant promised to so repair, but afterwards failed and neglected so to do; that in order to make the house so that it could be used and occupied by respondents, they were compelled to make the repairs, and did so at an expense to themselves of \$12.10. It is alleged that, on the 1st day of November, the day the rent became due and before any notice to quit was given, the respondents paid to appellant, by check, the rent due less the sum paid for repairs, and that they thereafter paid by a similar check the rent for the month of December; that appellant retained the checks until after the commencement of this action, and then returned them to respondents by mail.

It is argued that the allegations do not amount to a plea of payment or tender, for the reason that it is not alleged that appellant accepted the checks. Service in the action was made December 27, which was near two months after the check, less the amount of repairs, was delivered to appellant. The check was not returned until after that time. Such inexcusable delay to reject the payment either in amount or kind should be treated as an acceptance, or at least as effect-

Feb. 1908]

Syllabus.

ing a tender to the extent of preventing an attempted forfeiture for nonpayment of rent.

Other errors urged relate to the findings of the court. The findings were, in general effect, in accord with the affirmative allegations of the answer as above stated. It was also found that, prior to the commencement of the action, respondents duly tendered all rent due, less the said sum paid for repairs and \$4 paid for water rent, the tender being kept good in court. No objection was made to the manner of original tender or payment by check, the objection being merely to the amount because of the deduction for repairs. But the receipted bill for repairs was accepted from respondents by appellant's agent, and retained by the latter, so that it represented a payment. The amounts of the remaining tenders were therefore correct, and there was no default. The findings are sufficiently justified by the evidence, and the judgment is affirmed.

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[No. 7101. Decided February 7, 1908.]

FRANK R. HYDE *et al.*, *Appellants*, v. SEATTLE ELECTRIC COMPANY, *Respondent*.<sup>1</sup>

CARRIERS—INJURIES TO PASSENGERS—COLLISION WITH VEHICLE—CONTRIBUTORY NEGLIGENCE IN ALIGHTING—EVIDENCE—SUFFICIENCY. In an action by a passenger against a street car company for damages sustained by reason of a collision with a wagon, the plaintiff was guilty of contributory negligence, and there was no sufficient evidence of negligence on the part of the company, and a nonsuit is proper, where it appears that plaintiff was standing on the open deck of the car preparing to alight by stepping down to the running board, that he saw a wagon ahead at the crossing traveling parallel with and near to the side of the track where regrading of the street was going on, but stepped down onto the running board attempting to get off in close proximity to the wagon, the wheels of which slipped or lurched toward the track, and collided with the running board, causing the injury.

<sup>1</sup>Reported in 93 Pac. 903.

SAME—NEGLIGENCE OF CARRIER—WATCHMAN AT CROSSING. In such a case it is not negligence upon the part of the company to fail to keep a watchman at the place who should have prevented the wagon from traveling so close to the track, as regards passengers alighting.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered September 30, 1907, upon sustaining a motion for nonsuit after the close of plaintiff's case, dismissing an action for personal injuries sustained by a passenger through the collision of a vehicle with defendant's cable car. Affirmed.

*Richard Saxe Jones (James A. Snoddy, of counsel), for appellants.*

*Hughes, McMicken, Dovell & Ramsey, for respondent.*

DUNBAR, J.—This is an action for personal injuries received upon the Madison street cable line in the city of Seattle. The testimony is undisputed. The court, after the testimony of the plaintiffs was in, sustained a motion for nonsuit on the part of the defendant. The facts briefly are, in substance, as follows: The plaintiff Frank R. Hyde was riding on the Madison street cable line. The car upon which he rode consisted of a closed portion in the rear and an open portion in front, and had longitudinal seats in the open portion, the method of getting on the car in the open portion being by stepping on a running board or first step, and if the passenger desired to go further and opportunity offered, to step from the running board onto the second step or deck of the car.

At the time of, and some time prior to the time when, the injury occurred, Madison street from Fourth avenue to Second avenue was being reggraded, and dirt was being removed from the street and adjacent property by teams which came out of the excavations at the side of the tracks and down Madison street on the north side from Third avenue to Second avenue. The plaintiff Hyde testified that, as the car

Feb. 1908]

Opinion Per DUNBAR, J.

came down the hill, he noticed a team passing at and about the Second avenue crossing. The wagon was loaded with dirt. The car continued down the hill, not stopping at Third avenue. Hyde at that time was standing on the second step or deck of the car, leaning against the stanchion which is the support of the roof of the car. When the car got down nearly to the level of Second avenue where the plaintiff had been accustomed to alight, he prepared to step off from the car by putting one foot down on the lower step and taking hold of the iron handle of the forward end of the car with his right hand, holding onto the stanchion behind him with his left hand. He testifies that the car did not stop exactly where he expected it to stop, but went a few feet further. While standing on this board ready to step off when the car stopped, the wagon, which he had noticed before, came in contact with the car, overlapping the board of the car, striking plaintiff's right leg, breaking it in two places. For this injury this action was brought. Upon the dismissal of the action after the motion for nonsuit was granted, this appeal was taken.

It is contended by the appellants that the court erred in granting the motion for nonsuit and rendering judgment for the respondent; that a case was made which should have been submitted to the jury on the two main propositions, viz., whether there was any negligence on the part of the company, and whether there was contributory negligence on the part of the appellant Frank R. Hyde.

Appellants rely very strongly on the two cases of *Weir v. Seattle Elec. Co.*, 41 Wash. 657, 84 Pac. 597, and *Ranous v. Seattle Elec. Co.*, 47 Wash. 544, 92 Pac. 382. Reference to those cases convinces us that they have no bearing on the principles of law involved in this case. In the *Weir* case the plaintiff, relying upon the signal to stop at the place of his destination, took his position on the lower step with his hand on the extension ready to alight, while the car was

slowly approaching the far side of the street. But instead of stopping, the speed of the car was suddenly accelerated to such an extent that Weir was hurled from the car. *Ranous v. Seattle Elec. Co.* was substantially the same case. But here the appellant was not injured by being misled by the respondent into taking an unsafe position, or by any uncus-tomary or unexpected act on the part of the motorman.

It would be a harsh rule to announce that a street car company would be responsible for any damages that might be sustained by a passenger by reason of a vehicle coming in contact with the car. The car traveling on a fixed track has a right to presume that its right of way will be respected. Of course, this is aside from the question of the duty of the street car company to protect its passengers when danger from contact from the outside is known. But in this case the car was pursuing its way, and there was nothing to indicate that the wagon, which was traveling parallel with the car, would get any nearer to the track than it was. If danger from that source was apparent, it was just as apparent to the appellant as it was to the gripman, for appellant testifies that when he was at Third avenue, which is one block away from the place where the accident occurred, he saw and noticed the wagon. His attention having been called to the wagon at so short a distance from the scene of the accident, and knowing the condition of the street in that locality, he having testified that he had traveled on that car several times a day for a great length of time, it seems to us that the court rightly concluded that he was negligent in attempting to get off in such close proximity to the wagon. Notwithstanding the presumption in which a passenger may indulge, that the street car company will use the highest degree of caution and care, both in protecting its passengers while upon the car and in furnishing them a safe place to alight from the car, the passenger must use some little caution himself, and will not be justified in stepping into a place of imminent and apparent

Feb. 1908]

Opinion Per DUNBAR, J.

peril when he alights from a car. If a wagon is standing immediately in front of the steps of a car, a passenger would not be justified in stepping into it and entangling himself in its wheels or spokes, or in stepping into a place of danger of any kind. There is a good deal said in appellants' brief in relation to the passage of an ordinance by the city requiring the street car companies to maintain a watchman at the point where the appellant was injured, but an examination of the ordinance shows that it provided that this duty devolved upon the street car companies only after notification by the city, and there is no testimony that such notice was ever given. So that really the question of the effect of the ordinance need not be discussed. If the respondent was negligent at all, it was by reason of the fact that common prudence would demand of it to maintain a watchman at this place, outside of any legislation on the part of the city. We are not prepared to say that the condition was such that it was the duty of the respondent to maintain a watchman at this place, or that if there had been a watchman there in the prosecution of the ordinary duties of a watchman at such places, viz., the preventing of passengers from getting in the way of moving cars, he probably would have considered it his duty to have prevented this wagon from traveling as close to the track as it did travel. We are satisfied from the testimony that the accident occurred by the wheels of the wagon slipping and lurching through the mud down toward the car; that it was an accident for which the street car company was not responsible, and one which it could not be called upon to anticipate.

It is also contended by the appellants that the testimony shows that an inexperienced motorman was employed to operate the cars in this dangerous street, the grade here being exceedingly steep. But we think there is no testimony that would warrant this contention, or that shows any incompetency on the part of the motorman or other employees of the car company.

Under all the circumstances of the case we fail to find any negligence on the part of the respondent, but think that there was negligence on the part of the appellant in not noticing the danger in taking the position that he did take when the wagon was in such close proximity to him.

The judgment is affirmed.

HADLEY, C. J., ROOT, MOUNT, CROW, RUDKIN, and FULLERTON, JJ., concur.

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[No. 7113. Decided February 7, 1908.]

THOMAS FORD, *Respondent*, v. GEORGE H. SMITH *et al.*,  
*Appellants*.<sup>1</sup>

SALES — ACTION FOR PRICE — DEFENSES — BREACH OF WARRANTY. Upon a defense of breach of warranty in an action for the purchase price of horses sold, the defendants need not prove *scienter*, and it is error to instruct that the burden was on defendants to show that the vendor knew that the facts warranted were false, even though the answer also pleaded deceit and false representations.

SAME — TRIAL — INSTRUCTIONS. Error in such an instruction is not cured by the fact that it might have been applicable in an action for deceit.

Appeal from a judgment of the superior court for King county, Tallman, J., entered July 26, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Reversed.

*Aust & Terhune, McBride & Dalton*, and *W. B. Stratton*, for appellants, cited: *Shippen v. Bowen*, 122 U. S. 575, 7 Sup. Ct. 1283, 30 L. Ed. 1172; *Watson v. Jones*, 41 Fla. 241, 25 South. 678; *Johnson v. Gulick*, 46 Neb. 817, 65 N. W. 883, 50 Am. St. 629; *Carter v. Glass*, 44 Mich. 154, 6 N. W. 200, 38 Am. Rep. 240; *McKee v. Jones*, 67 Miss.

<sup>1</sup>Reported in 93 Pac. 909.

Feb. 1908]

Opinion Per DUNBAR, J.

405, 7 South. 348; *Huntington v. Lombard*, 22 Wash. 202, 60 Pac. 414; *Jones v. Emerson*, 41 Wash. 33, 82 Pac. 1017; *Tacoma Coal Co. v. Bradley*, 2 Wash. 600, 27 Pac. 454, 26 Am. St. 890; *Hanson v. Tompkins*, 2 Wash. 508, 27 Pac. 73; *Sears v. Stinson*, 3 Wash. 615, 29 Pac. 205; *Lawson v. Vernon*, 38 Wash. 422, 80 Pac. 559, 107 Am. St. 880; *Daniel v. Glidden*, 38 Wash. 556, 80 Pac. 811.

*Jay C. Allen*, for respondent, cited: *Northwestern S. S. Co. v. Dexter Horton & Co.*, 29 Wash. 565, 70 Pac. 59; 14 Am. & Eng. Ency. Law (2d ed.), pp. 85-88; *Staines v. Shore*, 16 Pa. St. 200, 55 Am. Dec. 492; *West v. Emery*, 17 Vt. 583. 44 Am. Dec. 356.

DUNBAR, J.—This action was brought by the respondent to recover the purchase price of a team of horses sold to the appellants. The appellants answered, alleging false representations and deceit on the part of the plaintiff in the sale of the horses, to wit, that the plaintiff represented that the horses were sound and true; also that the plaintiff warranted the horses to be sound and true; and that, upon the delivery of the horses to the defendants and trial by them of said horses, it was discovered that the representations made by the plaintiff were false, and that the horses were not sound, or at least that one of them was not, in that he was what is termed "windbroken" or unsound in wind, and also balky. The answer is a long one, setting up with great particularity all the circumstances of the trade, but what we have stated is, in substance, the answer and indicates the issues involved. Verdict was rendered in favor of the plaintiff. Judgment was entered, and appeal taken.

The court, among other things, instructed the jury as follows:

"If you do find that the plaintiff warranted the horses, even if you do find that the horses were not as represented, yet the defendants must show by a fair preponderance of the

evidence that the plaintiff knew at the time that said representations were false; that is, that the plaintiff knew at the time that the horse was unsound in wind and balky, and further that defendant relied on said statements."

The court further instructed:

"Before you can find a verdict for the defendant you must believe from a preponderance of the evidence that plaintiff did make the representations as to the horse being sound and free from defects as claimed by defendant, and you must further believe that the defendants relied thereon, and further that they were false, and you must go further and find that plaintiff knew they were false when he made them."

Other instructions along the same line were given, but the ones set forth we think sufficiently indicate the error which it is alleged the court made. These instructions constituted prejudicial error. In an action for breach of a warranty it makes no difference whether the seller knew that the alleged facts which he warranted to be true were true or not. The warranty is the contract upon which the purchaser relies, and the breach of the warranty constitutes the gist of the action. If it were otherwise, a warranty would have no more force or effect than a representation without a warranty; and when warranty is relied upon, it is well established that the *scienter* need not be alleged or proven. It is true that the answer in this case also alleges false representation and deceit. But these allegations do not destroy the allegations in relation to warranty, or prevent a recovery upon proof of the breach of the warranty. *Shippen v. Bowen*, 122 U. S. 575, 7 Sup. Ct. 1283, 30 L. Ed. 1172, and cases cited.

The respondent recognizes the force of this position, but claims that the instructions of a court must be viewed by this court in the light of the circumstances surrounding the case which is tried, and asserts that the theory of a warranty was an afterthought on the part of the appellants, and that the case was framed and tried on the theory only of false representations and deceit. But the answer directly alleges a war-

Feb. 1908]

Opinion Per DUNBAR, J.

ranty and the breach thereof, and the testimony of the appellants is plain and positive to the effect that the respondent did warrant and guarantee to the appellants that the horses were sound and true. It is true this testimony is contradicted by the respondent, but the jury had a right to determine these issues under proper instructions, and in this case, even if they had found that the warranty had been made as alleged and sworn to, they could not have found in favor of the appellants unless they had further found that the respondent knew that the alleged facts which he warranted to be true were untrue at the time the warranty was made, a finding which, as we have seen, it was unnecessary for the jury to make.

In view of the fact that another trial will be had, we express no opinion on the questions of false representations and deceit which developed in this case and which raise the questions so often raised in cases of this kind, as to what was a false representation of fact and what was a mere expression of opinion, questions which are largely determined by the circumstances of the particular case. But for the error above discussed, the judgment must be reversed, with instructions to grant a new trial.

HADLEY, C. J., ROOT, MOUNT, CROW, RUDKIN, and FULLERTON, JJ., concur.

[No. 7129. Decided February 7, 1908.]

C. H. WAIGHT, *Appellant*, v. LAKE WASHINGTON MILL  
COMPANY, *Respondent*.<sup>1</sup>

APPEAL—REVIEW—HARMLESS ERROR—RULINGS ON PLEADINGS. Error, if any, in striking affirmative matter in a reply on the ground that it should have been set out in the complaint, is immaterial where the plaintiff was allowed to prove the facts alleged in the reply.

MASTER AND SERVANT—NEGLIGENCE—PROMISE TO REPAIR—MATERIALITY—ISSUES AND PROOF. In an action for damages by the operator of a ripsaw, who was struck and knocked down by a belt, which broke on his use of the idler, a promise to repair the belt, made on the complaint that the belt was likely to start the machinery without the use of the idler and thereby cut the operator's hand, is immaterial and does not support plaintiff's cause of action.

SAME—CAUSE OF ACCIDENT—ISSUES AND PROOF. Conceding that the operator of a ripsaw was struck down by a belt which broke and caused the injury, a nonsuit is properly granted where the only allegations of negligence were that the machinery was out of plumb and the belt was too short, and there was no definite proof to sustain either of such allegations, or to show any cause for the breaking of the belt.

Appeal from a judgment of the superior court for King county, Griffin, J., entered June 6, 1907, granting a nonsuit at the close of plaintiff's testimony, dismissing an action for personal injuries sustained by an operator of a ripsaw in a sawmill. Affirmed.

*Reynolds, Ballinger & Hutson*, for appellant.

*Roberts & Hulbert*, for respondent.

DUNBAR, J.—This is an action brought by appellant for the recovery from respondent of damages for alleged personal injuries. The complaint alleges, that the plaintiff was employed by the defendant to operate a ripsaw in the defendant's

<sup>1</sup>Reported in 93 Pac. 1069.

Feb. 1908]

Opinion Per DUNBAR, J.

sawmill; that plaintiff was inexperienced in the operating of the machinery, and so informed the defendant at the time of his employment, but was assured that there was no danger in the operation of the rip saw; that the rip saw was operated by the use of steam power applied as follows: a belt runs around two pulleys, one of which pulleys is attached to said machine, the other around the main line shaft; the belt is so arranged that the machine remains at rest, except when the belt is tightened by the pressing against it of another pulley; that it was the duty of the plaintiff to start and stop said machine by the use of said pulley; that the defendant carelessly and negligently permitted said machine to be and to become out of plumb, and that said machine was out of plumb on the date on which the plaintiff received the injuries complained of; that the belt was too short, as defendant well knew, and that said machine being out of plumb, it was dangerous for a person to operate said machine; that defendant well knew of the dangerous condition of the machine, and negligently and carelessly permitted it to remain in that condition; that plaintiff was inexperienced in the matter of operating the machinery, and relied wholly upon the assurance and representations of the defendant as to the safety of the place in which he was required to work; that on the afternoon of the 12th day of December, 1906, plaintiff was in his accustomed place and operating said machine in the usual way; that at the same time plaintiff, in order to start the machine in the usual manner, permitted the pulley to be pressed against the belt of said machine, so negligently and carelessly provided and arranged by said defendant, and that said belt broke, striking plaintiff on the head and knocking him to the floor, where he remained for a long time unconscious, by reason of which he received the injuries complained of.

The answer denied negligence on the part of the defendant, and averred that the accident and injury to plaintiff, if any was received, was caused wholly by his own fault, care-

lessness, and negligence, and by reason of the dangers incident to his employment and assumed by him. To this affirmative defense, plaintiff replied with the allegation, in substance, that he had told the foreman that the upright belt was too tight; that it was so tight that sometimes when the idler pulley or tightener was not brought to bear, it would start the machinery, thereby placing the plaintiff in peril by reason of the fact that he was liable to get his hand sawed; that the defendant had agreed to repair the machinery, and that by reason of said agreement the plaintiff continued to work. To this affirmative matter defendant interposed a demurrer, which was overruled. Thereafter defendant moved to strike said affirmative matter, which motion the court sustained.

It was shown on the trial that the machine on which plaintiff worked was operated by a belt running from the main shaft to a pulley attached to the machine. The belt ran vertically, and was intended to be at rest except when tightened by being pressed upon by the large weight or tightener, which consisted of a very heavy pulley, the carriage of which was hinged in such a manner that, when it was desired to tighten the belt to start the machine into operation, the pulley could be lowered upon the belt, and its weight binding the belt would thereby have the effect to tighten the belt and cause it to put the machine in motion. It is the contention of the plaintiff that this belt was too short when the tightener was not pressing upon it, and that it would occasionally revolve the machinery, as before indicated. Upon the close of plaintiff's testimony, a motion for nonsuit was made by the defendant, which motion was sustained by the court. The cause was dismissed, and from judgment of dismissal this appeal is taken.

It is alleged that the court erred (1) in sustaining respondent's motion to strike the affirmative matter from the reply; (2) in refusing to permit appellant to show a promise of respondent's foreman to repair the defects which caused the

Feb. 1908]

Opinion Per DUNBAR, J.

injury; (3) in sustaining respondent's motion for nonsuit; (4) in refusing to overrule respondent's motion for nonsuit; (5) in rendering judgment dismissing the action. It was the theory of the court that the affirmative matter which was stricken should have been stated in the complaint, as it was a part of the appellant's cause of action, the appellant contending, however, that, inasmuch as assumption of risk and contributory negligence are matters of defense, he had a right to set up the promise to repair in his reply. But it is not necessary to pass upon the question of technical pleading, the appellant having been allowed, over respondent's objection, to prove exactly what he asked to be allowed to allege in his reply. If we should consider the case with the pleadings before us, as contended for by the appellant, there is no testimony which could sustain a judgment for appellant in this case; for, if it be conceded that he was induced to remain by reason of the foreman's promise to repair, there is no showing here whatever as to the cause of the injury. The matter complained of by the appellant to the foreman simply was that, by reason of the machine running without the use of the idler, he might get his hand cut. But there is no proof, and indeed no claim, that the accident occurred by reason of the machine running without the use of the idler. On the contrary, it is the appellant's contention that it was the use of the idler which caused the accident. So that, if there is any allegation of negligence here upon which a recovery could be based, it is the allegation that the upright belt was too short, and that by the application of the idler an additional strain was placed upon it which caused the belt to break.

It is the contention of the appellant, although the testimony is not definite in that regard, that he was struck on the head by the belt when it broke. We are not satisfied, from an examination of the model which was brought up, that the fact that the belt was too short would cause any more strain to be placed upon it by the application of the idler; for,

while it is true, as a principle of mechanics, that the weight which carries the belt out of perpendicular would tend to shorten it, thereby bringing an additional strain upon it, it is equally true that the longer the belt was and the more slack it had the more obliquely the idler would rest against it, thereby causing a greater weight to rest upon the belt than if the belt were tighter and the idler were held in a more perpendicular position with reference to the belt. But however this may be, the testimony, which is very brief, absolutely fails to show that the breaking of the belt was caused by its being too short; and although there is an allegation that the machine was out of plumb, the proof in this respect entirely fails to sustain the allegation. Under all the testimony in this case, nothing more than a guess could be hazarded as to what was the cause of the breaking of the belt. Conceding that there was sufficient proof that it did break, and further conceding that there was proof that the breaking of the belt was the cause of the injury, and there being but the two causes alleged, viz., the machinery being out of plumb and the belt being too short, and neither of these being supported by any definite proof whatever, the court was justified in sustaining the motion for nonsuit.

The judgment is therefore affirmed.

HADLEY, C. J., ROOT, MOUNT, CROW, RUDKIN, and FULLERTON, JJ., concur.

Feb. 1908]

Opinion Per DUNBAR, J.

[No. 7082. Decided February 8, 1908.]

**J. Q. REYNOLDS *et al.*, Appellants, v. M. M. DICKSON *et al.*,  
Respondents.<sup>1</sup>**

**PLEADING—DEMURRER TO COUNTERCLAIM—WAIVER.** A demurrer to a counterclaim, on the ground that it did not arise out of the same transaction as the cause set out in the complaint, is waived by the admission, without objection, of evidence in support of the counterclaim.

**SETOFF AND COUNTERCLAIM—CLAIMS ARISING FROM SAME TRANSACTION.** In an action to rescind a sale and cancel a chattel mortgage given by the plaintiffs, a counterclaim setting up the mortgage and seeking its foreclosure is so connected with the cause of action that it may be properly interposed.

**SALES—RESCISSION BY VENDEE—FRAUD—EVIDENCE—SUFFICIENCY.** Proof of fraud in the sale of a stock of goods, in that the invoice price was concealed and misrepresented by the vendors, is not sufficiently definite and convincing, where it appeared that, although the vendor's invoice book could not be found, from which the amount of goods on hand at the time of the sale could have been ascertained, the vendees had been in possession for five months, selling and adding to the stock, and keeping no account which would show what proportion of the goods had been sold, and there was no testimony showing fraud or conspiracy, and from the whole evidence the court could only hazard a guess as to the actual amount of goods delivered.

Appeal from a judgment of the superior court for Lincoln county, Warren, J., entered July 8, 1907, in favor of the defendants, upon granting a nonsuit at the close of plaintiff's testimony, and the overruling of a demurrer to the cross-complaint, in an action to rescind a sale. Affirmed.

*Martin & Wilson*, for appellants.

*Merritt, Hibschman, Oswald & Merritt*, for respondents.

DUNBAR, J.—The complaint in this case, briefly stated, alleged that the respondents, who were engaged in the mercantile business in the town of Reardon, state of Washington,

<sup>1</sup>Reported in 93 Pac. 910.

defrauded the appellants, who were farmers and alleged to be inexperienced in the mercantile business, by inducing them to exchange their farm for a stock of goods. The agreed value of the farm or real estate was \$7,000. Under the contract they were to receive goods out of the respondents' store to that amount. An invoice was taken and it was discovered that there was some \$1,630 in goods in excess of \$7,000, the value of the real estate. For this \$1,630 worth of goods, the appellants gave their note and chattel mortgage. It is alleged that the goods did not invoice the amount which the invoice showed by the sum of \$3,630, the plaintiffs alleging that the invoice book had been stolen by the defendants immediately upon the conclusion of the trade, and that the fraud had not been discovered until about five months after the trade had been made. The prayer was, for a temporary restraining order to prevent the respondents from in any way interfering with the goods; that the chattel mortgage be canceled; that the deed to the land, which had been executed, be canceled; that the agreement made and entered into be rescinded, and that, in case it was found impossible to place the parties to the agreement in the position which they had occupied prior to the contract, they take judgment against the respondents in the sum of \$3,630, together with costs and disbursements.

The respondents answered, denying all the material allegations of the complaint, and asking for damages by reason of the failure of the appellants to pay certain mortgages on the real estate which they had sold to respondents, and which it was alleged they had agreed to pay, and also asking for a foreclosure of the chattel mortgage aforesaid. After the appellants had introduced their testimony, on motion a nonsuit was entered against them, and evidence was heard in support of the respondents' cross-complaint, and judgment entered in favor of the respondents upon both demands. A demurrer was interposed to the affirmative answer and cross-complaint of the respondents, which demurrer was overruled. It is as-

Feb. 1908]

Opinion Per DUNBAR, J.

signed that the court erred in overruling this demurrer, in sustaining objection to testimony offered for the purpose of showing the amount of goods on hand in February when the second invoice was taken, in rejecting proof tendered by appellants as shown by the statement of facts, and in granting the nonsuit, in rendering judgment on respondents' cross-complaint, and in not granting a new trial.

The first contention is that the demurrer should have been sustained to the answer and cross-complaint, for the reason that it did not set forth a counterclaim under the statute. It is admitted by appellants that, if the counterclaim arises out of the same transaction, it is sufficient, but it is contended that it did not. Testimony was introduced in support of this affirmative defense without objection on the part of the appellants, and under the rule laid down by this court in *Jacobson v. Aberdeen Packing Co.*, 26 Wash. 175, 66 Pac. 419, the defect, if any, has been cured. But in addition to this, it seems to us that the affirmative matter here was undoubtedly so connected with the subject-matter of the plaintiffs' action that it was entitled to be admitted by way of counterclaim. What was said by this court in *Duggar v. Dempsey*, 13 Wash. 396, 43 Pac. 357, applies in full force to this case. There it was said:

"One of the objects of the suit was to have this mortgage and the notes secured thereby declared invalid, and to have them canceled and delivered up. This being so, their validity was necessarily involved in a trial of the issues made upon the complaint, and that was one of the issues which would necessarily have arisen, if an independent action to foreclose the mortgage had been instituted by the defendants. The facts to be determined under the complaint in this action, and in an independent action to foreclose the mortgage, would have been substantially the same: hence there was no good reason why the whole matter should not be determined in the action first brought. The subject-matter of the counterclaim was so connected with the cause of action set out in the complaint that it could properly be interposed."

So far as the merits of the case are concerned, we are not inclined to disturb the judgment of the trial judge. The admission of testimony showing the amount of goods on hand in February would not have aided the court in determining the amount of goods on hand at the time of the sale in September; for while it is true the appellants testified that they had kept an account of the cash sales and testified to the amount of such sales, it appeared from their own testimony that they were unable to determine from that fact what amount of goods such cash receipts represented according to the original invoice price. They testified that some of the goods were sold at the regular retail price, some at cost, and some below cost, and that they could not tell what proportion had been sold at a profit, what proportion at cost, and what proportion below cost. The whole testimony was so indefinite that the court could only hazard a guess as to the actual amount of the goods delivered. There was no testimony offered showing fraud or conspiracy on the part of the respondents, and no testimony tending to prove the allegation of the complaint that the respondents had stolen the invoice book, all the testimony on that subject being to the effect that the appellants had not been able to find it. This stock of goods had been received by the appellants at the price shown by the invoice. They assumed control of the business and managed it for nearly five months, buying, selling, and replacing goods, before making the discovery that they had been defrauded by misrepresentations as to the amount of goods they had received. Under such circumstances proof of fraud ought to be more definite and convincing than is the testimony given and tendered in this case.

Affirmed.

HADLEY, C. J., MOUNT, CROW, FULLERTON, and RUDKIN, JJ., concur.

Feb. 1908]

Citations of Counsel.

[No. 6884. Decided February 10, 1908.]

ED. V. DICKEY *et al.*, Respondents, v. A. L. MADDUX *et al.*,  
Appellants.<sup>1</sup>

WATERS—APPROPRIATION—BOGS ON PUBLIC LANDS—STATUTES—CONSTRUCTION. Pools of water in a bog or marsh on public lands, about one-half an acre in extent, occasioned by seepage water coming from a hillside, fed by no live springs, stream, or channel of water, and having no flow from the bog, are not subject to appropriation under the common law, nor under territorial laws 1873, p. 520, authorizing the appropriation of the waters of streams or creeks in Yakima county.

SAME—PRESCRIPTION—COMPLIANCE WITH STATUTE. No prescriptive right to waters of a bog or marsh, used since 1884, can be claimed under Laws 1891, p. 327, where there has been no attempt to comply with the provisions of such law since its enactment.

RUDKIN and FULLERTON, JJ., dissent.

Appeal from a judgment of the superior court for Kittitas county, Rigg, J., entered January 31, 1907, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, enjoining the taking of water from springs appropriated by the plaintiffs. Reversed.

*J. B. Davidson*, for appellants, contended, *inter alia*, that the owner of the soil has the exclusive right to a spring formed by percolating waters. *Southern Pac. R. Co. v. Dufour*, 95 Cal. 615, 30 Pac. 783, 19 L. R. A. 92; *Metcalf v. Nelson*, 8 S. D. 87, 65 N. W. 911, 59 Am. St. 746; *Tampa Waterworks Co. v. Cline*, 37 Fla. 586, 20 South. 780, 53 Am. St. 262, 33 L. R. A. 376; *Bloodgood v. Ayers*, 108 N. Y. 400, 15 N. E. 433, 2 Am. St. 443; Angell, *Watercourses* (7th ed.), §§ 108b and 108p; Farnham, *Waters & Water Rights*, p. 2082, § 672a. And a prescriptive right cannot be obtained by the use of the same. *Wheelock v. Jacobs*, 70 Vt. 162, 40 Atl. 41, 67 Am. St. 659, 43 L. R. A. 105; *Frazier v.*

<sup>1</sup>Reported in 93 Pac. 1090.

*Brown*, 12 Ohio St. 294; *Crescent Min. Co. v. Silver King Min. Co.*, 17 Utah 444, 54 Pac. 244, 70 Am. St. 810; *Elster v. Springfield*, 49 Ohio St. 82, 30 N. E. 274; *Wheatly v. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721; *Trustees of Delhi v. Youmans*, 50 Barb. 316; *Chase v. Silverstone*, 62 Me. 175, 16 Am. Rep. 419.

*Hovey & Hale*, for respondents, to the point that the right of appropriation exists as to springs, whether by percolation or not, cited: *Willis v. Perry*, 92 Iowa 297, 60 N. W. 727, 26 L. R. A. 124; *Smith v. Brooklyn*, 160 N. Y. 357, 54 N. E. 787, 45 L. R. A. 664; *Bruening v. Dorr*, 23 Colo. 195, 47 Pac. 290, 35 L. R. A. 640; 2 Farnham, Water Rights, pp. 1559, 1655, 1744, 1751, 2410; *Crescent Min. Co. v. Silver King Min. Co.*, 17 Utah 444, 54 Pac. 244, 70 Am. St. 810.

Root, J.—This is an action brought by respondents to enjoin appellants from interfering with the taking of water from certain alleged springs situated on the lands of appellants, which water the respondents claim was appropriated by their predecessor in interest in 1883. From a decree in favor of plaintiffs, this appeal is taken by defendants.

It is urged by appellants that the so-called springs are not flowing springs, nor in reality springs at all, and that there is no stream connected therewith; but that they are merely pools of seepage water coming from the side hill, and making a marsh or bog, and not constituting the character of water authorized to be appropriated under the law.

It appears that there was about half an acre of these so-called springs, and that during a portion of the year there was a surrounding area of something like ten acres which was marshy. One witness said "there was a piece of level ground that goes off to the south and drops very abruptly; these springs rest right in the brow of that little drop-off. There was quite a bit of water standing around in the springs; looked like there might be five or six springs." The evidence

Feb. 1908]

Opinion Per Root, J.

showed that there was no stream leading into these springs, and that the water therefrom formed no channel or stream in leaving, although during a portion of the wet season of the year some of the water would flow down (but not in any stream or channel) for a short distance on the side hill, where it would disappear in the soil.

A territorial statute enacted in 1873 reads as follows:

"Be it enacted by the legislative assembly of the territory of Washington, that any person or persons, corporation or company who may have or hold a title or possessory right or title to any agricultural lands within the limits of Yakima county, Washington territory, shall be entitled to the use and enjoyment of the waters of the streams or creeks in said county for the purpose of irrigation and making said land valuable for agricultural purposes to the full extent of the soil thereof." Laws 1873, page 520, § 1.

This and the common law were in force at the time of the alleged appropriation of this water. Respondents claim that these springs are surface bodies of water, and that, though their source may be from percolating water, they themselves are situated open to the air and that they were flowing springs a portion of the year. It is admitted that this land was originally a portion of the Northern Pacific Railway Company's land grant. It is claimed by respondents that the rights of this company did not attach to said lands until December, 1884, and that under § 2339, of the revised statutes, respondents or their predecessors in interest had a right to appropriate this water from these springs prior to said date. An examination of the evidence convinces us that these pools of water were not live springs, and constituted nothing more than a bog occasioned by the seepage water. No stream or channel entered this bog or flowed therefrom. The respondents and their predecessors gathered this water by digging a large number of holes and small ditches, and it was only by this artificial means that any channel was made or any flow of the water obtained other than the natural percolating and

seepage thereof, and there was but a comparatively small amount of that.

We think there was no authority in law for the appropriation of water of this kind prior to the enactment of the state statute of 1891 [p. 327], even if that statute would authorize it, a question not necessary to be now decided.

It is urged by respondents that they have used the water a sufficient length of time since the enactment of the statute of 1891 to give them a prescriptive right thereunder. As they have never complied nor attempted to comply with the provisions of the last-mentioned statute, we do not believe they are entitled to invoke it in support of their claim to the use of this water. See, *Wheelock v. Jacobs*, 70 Vt. 162, 40 Atl. 41, 67 Am. St. 659, 43 L. R. A. 105; *Slaght v. Northern Pac. R. Co.*, 39 Wash. 576, 81 Pac. 1062; *Atkinson v. Washington Irr. Co.*, 44 Wash. 75, 86 Pac. 1123; *Hathaway v. Yakima Water & Light Co.*, 14 Wash. 469, 44 Pac. 896, 53 Am. St. 847.

Farnham, *Waters and Water Rights*, § 458, says:

"Water oozing from a spring through soft and spongy ground, and flowing into a pond, does not constitute a stream within the meaning of a lease demising the pond of water and the water of the stream leading thereto; and the lessor is not liable for having sunk a tank on the ground adjoining the demised premises, thereby drawing off from the marshy ground such oozing water."

See, also, *Geddis v. Parrish*, 1 Wash. 587, 21 Pac. 314; *Meyer v. Tacoma L. & P. Co.*, 8 Wash. 144, 35 Pac. 601; *Southern Pac. R. Co. v. Dufour*, 95 Cal. 615, 30 Pac. 783, 19 L. R. A. 92; Angell, *Watercourses* (7th ed.), §§ 108b and 108p; Farnham, *Waters and Water Rights*, § 672a.

The judgment of the honorable superior court is reversed, and the cause remanded with instructions to dismiss the action.

HADLEY, C. J., MOUNT, and CROW, JJ., concur.

RUDKIN and FULLERTON, JJ., dissent.

Feb. 1908]

Opinion Per HADLEY, C. J.

[No. 6982. Decided February 10, 1908.]

JOHN MERRILL, *Respondent*, v. THOMAS O'BRYAN,  
*Appellant*.<sup>1</sup>

PARTNERSHIP—AUTHORITY OF PARTNER—SCOPE OF BUSINESS. The purchase of lumber by a transportation copartnership, operating steamers on the Yukon river, is within the scope of the authority of one of the resident managing partners, although the company did not do a trading business, where the lumber was used by the partnership in the construction of a warehouse to be used in its business.

APPEAL—REVIEW—FINDINGS—QUESTIONS OF FACT. Whether the act of a partner is within the scope of his employment is a question of fact, and a finding thereon will not be disturbed if the evidence is sufficient to sustain it.

EVIDENCE—DECLARATIONS OF PARTNER—AUTHORITY. Upon a sale of lumber to a nontrading partnership, the declaration of the partner making the purchase that the lumber was to be used, and was used, to build a warehouse for the company's business is not inadmissible, but is a fact concerning the business, which may be shown.

CONTINUANCE—GROUNDS—SURPRISE. Surprise from unexpected evidence, as ground for a continuance, is not shown where, three months before the trial, an affidavit, used by stipulation as a deposition, apprised the party that the fact testified to would arise at the trial.

Appeal from a judgment of the superior court for King county, Yahey, J., entered March 4, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

*P. D. Hughes* and *Fenley Bryan*, for appellant.

*Peters & Powell*, for respondent.

HADLEY, C. J.—This is an action to recover the contract price of a quantity of lumber and a small amount of building paper. The amount sought to be recovered is \$5,890. The action was brought by the vendor of the lumber against

<sup>1</sup>Reported in 93 Pac. 917.

Thomas O'Bryan, Edward M. Sullivan, and L. E. J. Davis, co-partners under the firm name of Dawson and White Horse Navigation Company. The defendant O'Bryan is the only member of the partnership who was served with summons or who appeared in the action. The contract of sale was made with the defendant Sullivan at St. Michaels, Alaska, in September, 1901, and the lumber was delivered into his charge at that time and place. He delivered to the plaintiff a draft on the Canadian Bank of Commerce for the payment of \$5,890, upon condition expressed in the draft that the lumber and paper, an invoice of which was attached to the draft, should arrive at Dawson, Yukon Territory, on or before November 1, 1901. The draft was signed: "Dawson & White Horse Nav. Co., per E. M. Sullivan, Manager." It was presented to said bank about July 1, 1902, and payment was refused. Meantime the lumber did not arrive at Dawson before November 1, 1901, or at all, for the reason that Sullivan used it in the construction of a warehouse at St. Michaels. The defendant partners were the owners of steamers plying the Yukon river, and were at that time engaged in the transportation of freight up and down said river between Dawson and St. Michaels.

The defendant O'Bryan, who appeared and defended, admits that Sullivan was a member of the partnership at the time he bought the lumber, but claims that as such partner he had no authority to purchase the lumber in behalf of the partnership, for the reason that the partnership was a non-trading one and existed for the purpose of carrying on a transportation business only. The court tried the cause without a jury and rendered a judgment in favor of the plaintiff for the full amount with interest against the partnership, enforceable against the joint property of the partners and against the separate or any property of the defendant O'Bryan. Defendant O'Bryan has appealed.

The court found that the sale was made to the partnership through the defendant Sullivan, a member of the firm; that

Feb. 1908]

Opinion Per HADLEY, C. J.

it was agreed that, in the event the lumber was not transferred to Dawson on or before November 1, 1901, then payment for it should be made on July 1, 1902; that it was not transferred to Dawson for the reason before stated, and that the warehouse erected at St. Michaels by the use of the material was for the partnership, and to enable defendants to house and store such freight as might come into their possession at St. Michaels consigned to points up the Yukon river, and which should come into their possession after the closing of navigation by the ice. We think the findings are justified by the evidence.

It is contended that the authority of Sullivan to bind the firm was not shown, in that it appeared that the partnership existed for a transportation business only, and that he was therefore not authorized to purchase lumber or other material for trading purposes. There was, however, no evidence to the effect that the purchase was made for trading purposes, and it was certainly within the scope of the partnership business to purchase lumber for some purposes. The partnership operated three steamers upon the Yukon river and handled a large amount of freight. The use of lumber for the construction of warehouses at terminal points or en route, for the housing of freight, or its use in the construction of barges, scows, or small boats, or in repairing the steamers, was certainly within the scope of the business of such a partnership, and this material was in fact used to construct a warehouse at a terminal point. Sullivan was at St. Michaels looking after the business of the partnership, and considering the nature and scope of the business as above stated he, as a partner, was a principal and had actual authority to purchase the lumber. He also had apparent authority to bind his partners. So far as third persons who deal with a partner without notice are concerned, the copartners are bound if the transaction be such as the public may reasonably conclude is directly and necessarily embraced within the partnership busi-

ness as being incident or appropriate to such business according to the course and usage of conducting it. *Heirn v. M'Caughan*, 32 Miss. 17, 66 Am. Dec. 588; *Pahlman v. Taylor*, 75 Ill. 629; *Todd v. Jackson*, 75 Ind. 272; *Seaman v. Ascherman*, 57 Wis. 547, 15 N. W. 788; 22 Am. & Eng. Ency. Law (2d ed.), 141, 142.

In the case of *Alley v. Bowen-Merrill Co.*, 76 Ark. 4, 88 S. W. 838, 113 Am. St. 73, it was held that a partner in a nontrading partnership may effectually bind his partners by an act apparently within the scope of the partnership. Whether the act of a partner is within the scope of his authority is a question of fact to be determined by the court or jury trying the facts. *Dowling v. Exchange Bank of Boston*, 145 U. S. 512, 12 Sup. Ct. 928, 36 L. Ed. 795. The fact in this regard having been determined by the trial court against the partnership, and the evidence in the record being, as we believe, sufficient to sustain the finding, we shall not disturb it.

It is insisted that the court erred in admitting in evidence the declaration of Sullivan to the effect that he would use, and did use, the lumber to build the warehouse. It is true the authority of an agent is not established by proof of his own declarations, but in this case the fact of the partnership and the general nature of its business were admitted, and the declarations of the partner that he did a specific act which act was clearly within the actual or apparent scope of the partnership business, was not a declaration as to his authority as an agent, but was the mere statement or admission of a fact concerning partnership transactions. As such the testimony was admissible against all the partners. 22 Am. & Eng. Ency. Law (2d ed.), 140; *Griswold v. Haven*, 25 N. Y. 595, 82 Am. Dec. 380; *Coleman v. Pearce*, 26 Minn. 123, 1 N. W. 846.

Some contention is made that appellant was surprised by respondent's evidence tending to show the necessity for build-

Feb. 1908]

Statement of Case.

ing the warehouse, and that the court erred in not granting the continuance at the trial for that reason. We think the point is not well taken. The trial was had in June, 1906, and appellant introduced in evidence the affidavit of Davis, one of the partners, which was, by consent, used as a deposition. The affidavit was subscribed in March, nearly three months before the trial, and it denied that the lumber was used to erect a warehouse by authority of the partnership. It is therefore manifest that appellant anticipated that the question of the necessity for the warehouse would arise at the trial, and he was not in position to claim such surprise upon that subject as justified a continuance.

The judgment is affirmed.

FULLEERTON, RUDKIN, CROW, MOUNT, and DUNBAR, JJ.,  
concur.

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[No. 7164. Decided February 10, 1908.]

THE STATE OF WASHINGTON, *on the Relation of Augustus H.  
Holcomb, Plaintiff*, v. JOHN B. YAKEY, *Judge etc.,  
Respondent*.<sup>1</sup>

**APPEAL—DECISIONS REVIEWABLE.** An appeal from a portion of a decree is expressly authorized by Bal. Code, § 6503.

**DIVORCE—ALIMONY—APPEAL—SUPERSEDEAS—RIGHT TO MANDAMUS.** Upon appeal from that portion of a decree of divorce awarding alimony and directing the surrender of property, the appellant has a statutory right to a supersedeas pending appeal; and mandamus will lie to compel the superior court to fix the amount of the supersedeas bond.

Application filed in the supreme court January 3, 1908, for a writ of mandamus to the Honorable John B. Yakey, judge of the superior court for King county, to compel the

<sup>1</sup>Reported in 93 Pac. 928.

fixing of the amount of a supersedeas bond pending appeal from a decree of divorce. Granted.

*Herbert E. Snook*, for appellant.

*Bo Sweeney*, for respondent.

PER CURIAM.—On the 2d day of December, 1907, a decree of divorce was entered in a certain action then pending in the superior court of King county, wherein Eva Holcomb was plaintiff and the relator herein was defendant. The decree disposed of the property rights of the parties and awarded to the plaintiff the sum of \$50 per month alimony, and the care and custody of a minor child. On the 20th day of December, 1907, the defendant gave written notice of appeal from the decree, excepting that portion thereof awarding a divorce to the plaintiff, and that portion awarding certain personal property to the defendant. He then applied to the trial court to fix the amount of the supersedeas bond pending the appeal in order to effect a stay of proceedings. The court refused to fix the amount of the bond or to supersede the judgment, and application was thereupon made to this court for a writ of mandamus requiring it so to do. The alternative writ issued and the matter is now before us on the return thereto. The petition for the writ and the return are devoted largely to a discussion of the merits of the original case and to certain contempt proceedings instituted to enforce the payment of the alimony awarded by the original decree, but these questions are not now before us. The return further challenges the sufficiency of the notice of appeal, because the appeal is prosecuted from a portion of the decree only, but such an appeal is expressly authorized by statute. Bal. Code, § 6503 (P. C. § 1051).

The only question we can consider at this time is, has an appellant a statutory right to supersede the judgment in a divorce action pending an appeal therefrom. Our statute, and the decisions of this court construing the same, would

Feb. 1908]

Opinion Per Curiam.

seem to leave no room for doubt on that question. In *State ex rel. German-American etc. Sav. Bank v. Superior Court*, 12 Wash. 677, 42 Pac. 123, this court said:

"Our statute as to appeals, in one section, provides at length what judgments and orders may be appealed from, and in another section, in the same act, provides how proceedings on an order or judgment appealed from may be stayed, and in our opinion it is clear that the legislature intended to give to the party prosecuting an appeal from any order or judgment the right to take advantage of the provisions for staying execution. There is no reason for holding that the provision as to stay bonds applies to one order or judgment mentioned in the preceding section and not to another, and as it must apply to some we feel compelled to hold that it applies to all, and since an order appointing a receiver is in express terms made appealable by the provisions of the act, it must be held that the provision as to stay of proceedings, in the same act, applies to an order of that kind."

To the same effect see, *State ex rel. Denham v. Superior Court*, 28 Wash. 590, 68 Pac. 1051, and cases there cited. In fact we have repeatedly held that prohibitory injunctions and other self-executing judgments are substantially the only ones that may not be superseded under Bal. Code, § 6506 (P. C. § 1054). A decree awarding alimony and directing one of the parties thereto to surrender property to the other falls clearly within the provisions of the supersedeas statute, and the peremptory writ will issue as prayed.

[No. 7053. Decided February 10, 1908.]

**HOLLY STREET LAND COMPANY, *Appellant*, v. PAULINE  
BEYER, *Respondent*.<sup>1</sup>**

**TRUSTS—RESULTING TRUSTS—PAROL EVIDENCE TO ESTABLISH.** There is an exception to the rule that a trust in real property cannot be proved by parol, where an effort was made to oust parties in possession claiming adversely, and the trustee intervened for their benefit, taking a quitclaim deed in his own name for convenience; since equity will not permit such a trustee to assert title against the persons for whose benefit it was acquired.

**HUSBAND AND WIFE—COMMUNITY OR SEPARATE PROPERTY.** Where separate property of a husband is conveyed in exchange for other property, the latter is not community property.

**TRUSTS—DEED BY TRUSTEE—JOINDER BY WIFE.** Where property is acquired by a married man as trustee for another, his wife need not join in a conveyance thereof.

**TRIAL—RECEPTION OF EVIDENCE—TIME FOR OBJECTION.** An objection to parol evidence of a deed, on the ground that there was no sufficient evidence of its loss, is waived if not made when the parol evidence was offered.

**MONEY PAID—LIENS FOR—EJECTMENT—LIEN FOR ADVANCES.** A lien for moneys, advanced by a trustee in compromising a foreclosure suit for the benefit of defendants, cannot be asserted by innocent purchasers from the trustee, in their action of ejectment, upon their failure to sustain their title, especially where the advancement was made as a gift or in discharge of a legal obligation.

**APPEAL—REVIEW—QUESTIONS NOT PRESENTED BELOW.** Unsuccessful plaintiffs in ejectment, entitled to a lien for taxes paid, cannot assert a claim therefor on appeal, when not presented in the court below.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered May 14, 1907, upon the verdict of a jury rendered in favor of the defendant, in an action of ejectment. Affirmed.

*Healy & Slentz and Fairchild & Bruce*, for appellant.

*Rose & Craven*, for respondent.

<sup>1</sup>Reported in 93 Pac. 1065.

Feb. 1908]

Opinion Per RUDKIN, J.

RUDKIN, J.—The defendant in this action acquired title to the property in controversy on the 13th day of June, 1890. On the 12th day of December, 1891, judgment of foreclosure was entered against the property in the superior court of Whatcom county, in a certain action wherein the Fairhaven Land Company was plaintiff and the defendant herein and her husband were defendants. The property was sold on execution pursuant to this judgment on the 30th day of January, 1892, and bid in by the execution plaintiff, the Fairhaven Land Company. The sale was thereafter confirmed and a sheriff's deed issued to the purchaser on the 20th day of October, 1893. On the 15th day of March, 1897, a writ of assistance was awarded to place the purchaser in possession. While this writ was in the hands of the sheriff for execution, and on the 17th day of February, 1898, one R. E. Meyer settled and compromised the matter with the Fairhaven Land Company, by conveying to that company certain lands owned by him, the deed of conveyance reciting that the property so conveyed was his separate property. The Fairhaven Land Company in turn, on the same day, quitclaimed and released the property in controversy to Meyer. On the 5th day of September, 1899, Meyer conveyed this property, together with other property, to his brother Fred Meyer, and the plaintiff in this action claims title by mesne conveyance under him. The defendant on the other hand claims title; (1) by adverse possession for more than ten years; (2) by deed from R. E. Meyer of an earlier date than the deed under which the plaintiff claims; and (3) upon the ground that the title acquired by Meyer from the Fairhaven Land Company was taken in trust for the defendant. The case was tried before a jury, and from a judgment in favor of the defendant, the plaintiff has appealed.

The first and principal assignment of error is the refusal of the court to withdraw the case from the consideration of the jury and direct judgment in favor of the appellant. This

assignment is very general and numerous questions have been discussed under it. It is contended that a trust in real property cannot be proved by parol; that the title acquired by Meyer from the Fairhaven Land Company was community property and could not be conveyed by him without his wife joining in the conveyance, and that there was no sufficient evidence of the loss of the deed from Meyer to the respondent, or of its execution, contents, or delivery.

While it is true, as a general rule, that a trust in real property cannot be proved by parol, we think this case falls within a well-established exception to that rule. The respondent was in possession of the property holding and claiming adversely to the Fairhaven Land Company, whether rightfully or wrongfully we need not inquire. When an effort was made to oust her, Meyer intervened and agreed to settle the adverse claim to the property for her and in her behalf. He did so by paying the amount demanded by the adverse claimant, and took a quitclaim deed in his own name merely as a matter of convenience, and because of certain difficulties then existing between the respondent and her husband. When a party acquires title to property in such a way, a court of equity will not permit him, or those claiming under him, to assert the title so acquired against the person in whose behalf and for whose benefit it was acquired. *Borrow v. Borrow*, 34 Wash. 684, 76 Pac. 305; *Peterson v. Hicks*, 43 Wash. 412, 86 Pac. 634, and cases there cited.

The claim that the title acquired by Meyer under the quitclaim deed from the Fairhaven Land Company became community property of himself and wife, is not borne out by the record. The property conveyed by Meyer in settlement and satisfaction of the claim of the Fairhaven Land Company was his separate property, or at least the conveyance so recited. If it was community property he conveyed nothing in exchange. The quitclaim deed was, therefore, acquired in exchange for separate property or by gift, and in either event

Feb. 1908]

Opinion Per RUDKIN, J.

the interest acquired would be separate property. Furthermore, if Meyer acquired title to the property in controversy as a naked trustee he acquired no beneficial interest, and a joinder of his wife in a reconveyance was unnecessary. It is quite apparent from the record that there was no sufficient evidence of the loss of the deed from Meyer to the respondent to warrant the admission of parol testimony of its contents. But an objection of this kind cannot be raised for the first time in a request for instructions, or in this court. If not made when the parol testimony is offered, it is deemed waived. *Wheeler, Osgood & Co. v. Ralph*, 4 Wash. 617, 30 Pac. 709; *Price v. Scott*, 13 Wash. 574, 43 Pac. 634.

Considering the fact that the respondent remained in possession of the property in controversy, claiming the same as her own, until the death of Meyer some four years after he acquired the quitclaim deed, and considering further the declarations of the grantor, the relationship of the parties and all the surrounding circumstances, we think there was ample testimony of the execution, contents, and delivery of the deed to warrant the submission of the question to the jury. Some objections are urged against the charge of the court, but these present no questions that we have not already considered.

The appellant suggests that it is at least entitled to a lien against the property for the amount paid by Meyer, and for the amount of the taxes paid. The action was not prosecuted for the purpose of enforcing a lien for moneys advanced by Meyer, and furthermore, it appears that the advancement was made as a gift or in satisfaction of some obligation legal or moral which Meyer deemed he owed to the respondent; and from such a payment no claim or cause of action could accrue. The appellant was doubtless entitled to a lien for taxes paid on the property, but such claim should have been presented to the court below at or prior to the rendition of judgment. It cannot be asserted here for the first time.

This disposes of all the questions presented by the appeal, and finding no error in the record, the judgment is affirmed.

HADLEY, C. J., FULLERTON, CROW, MOUNT, and DUNBAR, JJ., concur.

[No. 7131. Decided February 10, 1908.]

JOSEPH N. MORRIS, *Appellant*, v. MAYNARD WARWICK,  
*Respondent*.<sup>1</sup>

COSTS — BONDS FOR COSTS — ADDITIONAL SECURITY. Bal. Code, § 5186, authorizing the court to require an additional cost bond by a nonresident plaintiff "upon proof that the original bond is insufficient security" applies to insufficiency in the amount of the bond as well as to the sufficiency of the sureties.

SAME — DISMISSAL OF ACTION — FAILURE TO FILE COST BOND. Where a nonresident plaintiff fails to furnish an additional cost bond as required by the court, the action is properly dismissed.

Appeal from an order of the superior court for Lincoln county, Warren, J., entered August 27, 1907, dismissing an action upon plaintiff's failure to comply with an order requiring the filing of an additional cost bond. Affirmed.

*J. T. Mulligan, N. T. Caton, and Martin & Wilson*, for appellant.

*Merritt, Hibschan, Oswald & Merritt*, for respondent.

RUDKIN, J.—This action was commenced in the court below on the 1st day of April, 1905. On the 5th day of May, 1905, the defendant entered his appearance and moved the court for an order requiring the plaintiff to execute and file a \$200 cost bond, on the ground that he was a nonresident of the state. On the same day a cost bond in the sum of \$200 was filed on the part of the plaintiff. The case was thereafter tried and a judgment of nonsuit entered, but the

<sup>1</sup>Reported in 93 Pac. 905.

Feb. 1908]

Opinion Per RUDKIN, J.

judgment of nonsuit was reversed by this court and a new trial ordered. *Morris v. Warwick*, 42 Wash. 480, 85 Pac. 42. After the cause was remanded another trial was had, and the jury failed to agree. The defendant thereupon moved the court for an order requiring the plaintiff to execute an additional cost bond, filing an affidavit in support of the motion, showing that the costs already incurred by the defendant amounted to the sum of \$650. On the 24th day of June, 1907, an order was entered requiring the plaintiff to give and furnish an additional cost bond in the penal sum of \$650 within forty days from that date. After the expiration of the forty days, the defendant moved the court to dismiss the action for failure to file the additional cost bond within the time directed, and from the order granting this motion, the present appeal is prosecuted.

On this record two questions are presented: (1) had the court authority to require the additional cost bond under the circumstances stated; and (2) if so, was the action properly dismissed for failure to comply with the order of the court in that regard. The statute under which the bond was demanded reads as follows:

"When a plaintiff in an action resides out of the county, or is a foreign corporation, security for the costs and charges which may be awarded against such plaintiff may be required by the defendant. When required, all proceedings in the action shall be stayed until a bond, executed by two or more persons, be filed with the clerk, conditioned that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action, not exceeding the sum of two hundred dollars. A new or additional bond may be ordered by the court or judge, upon proof that the original bond is insufficient security, and proceedings in the action stayed until such new or additional bond be executed and filed. The plaintiff may deposit with the clerk the sum of two hundred dollars in lieu of a bond." Bal. Code, § 5186 (P. C. § 1123).

Counsel for appellant contend that the term "insufficient security" in the above section means insufficiency of the sure-

ties on the bond filed in the first instance, and not insufficiency in the amount of the bond. There are numerous statutes in this state authorizing courts and boards to require additional bonds from officers and litigants. Such are the statutes relating to official bonds, Bal. Code, § 1522 (P. C. § 3268); attachments, Bal. Code, § 5356 (P. C. § 516); injunctions, Bal. Code, § 5439 (P. C. § 491); executors and administrators, Bal. Code, § 6157 (P. C. § 2450); guardians, Bal. Code, § 6404 (P. C. § 2738); appeals, Bal. Code, § 6512 (P. C. § 1060).

The context of these several statutes generally shows what is meant by insufficient security. Some of those cited clearly refer to the insufficiency of the sureties on an existing bond, while others as clearly relate to the amount of the bond as well. We think the statute under consideration is of the latter class. The first part of the section requires nonresidents of the county and foreign corporations to give security for costs. The amount of such costs is necessarily indeterminate at the time of the commencement of the action, and the next provision fixes the amount of the original bond at the sum of \$200. This sum may not be sufficient security in all cases, and therefore the next provision authorizes the court to require an additional bond. Such was the view taken by this court in *Robinson v. Haller*, 8 Wash. 309, 36 Pac. 134, where we said:

"It is urged by the respondents that in cases where there are numerous defendants, the costs would in all probability aggregate a sum far in excess of \$200; and that, therefore, a single bond would not be a sufficient protection. But to meet this contingency the same section of the statute provides that a new or additional bond may be ordered by the court or judge upon proof that the original bond is insufficient security, and proceedings in the action stayed until such new or additional bond be executed and filed."

See, also, 11 Cyc. 190. The court therefore acted within its jurisdiction in requiring the appellant to give the additional

Feb. 1908]

Opinion Per RUDKIN, J.

bond, and the action was properly dismissed for failure to comply with the court's order. *Carlson Bros. & Co. v. Van De Vanter*, 19 Wash. 32, 52 Pac. 323. There is no error in the record and the judgment is affirmed.

HADLEY, C. J., CROW, MOUNT, and DUNBAR, JJ., concur.

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[No. 7052. Decided February 11, 1908.]

*In the Matter of the Estate of WILLIAM MCKEEVER,  
Deceased.*<sup>1</sup>

JUDGMENT—VACATION—HOMESTEAD—ORDER SETTING APART—REVIEW. An order setting aside a homestead for the use of a widow and children is a final order which can be set aside only by motion for a new trial or petition on statutory grounds, under Bal. Code, §§ 4953 and 5153, and cannot be vacated on petition of the widow on the mere allegation that the property was community property and that she was entitled to the exclusive possession of the same.

Appeal from a judgment of the superior court for San Juan county, Joiner, J., entered July 2, 1907, denying a petition to vacate an order setting aside property as a homestead for the use of a widow and minor children. Affirmed.

*Douglas, Lane & Douglas*, for appellant.

*W. R. Garrett*, for respondent.

RUDKIN, J.—William McKeever, a resident of San Juan county, in this state, died intestate on the 10th day of January, 1906. On the 8th day of March, 1906, his widow, Faith Helen McKeever, was appointed administratrix of his estate. On the 5th day of February, 1907, an order was entered in the estate matter, on application of the administratrix, setting apart the property now in controversy as a homestead for the use of the widow and two minor children

<sup>1</sup>Reported in 93 Pac. 916.

of the deceased. On the 3d day of July, 1907, the widow, having remarried in the meantime, petitioned the court to vacate the former order setting aside the homestead for the use of the widow and minor children and to enter an order setting the same aside for her sole use and benefit, to the exclusion of the children. The only reason assigned for vacating the first order is contained in the following paragraph of the petition:

"That your petitioner is advised and now believes that the above described property, being the community property of the petitioner and said William McKeever, deceased, and being the homestead of the petitioner and said William McKeever, and having been duly selected as a homestead by the petitioner by declaration filed and recorded as aforesaid, vested, upon the death of said William McKeever in your petitioner, as the surviving widow of said deceased, free and clear of any claim, right, title, or interest of the said minor children, and your petitioner is informed and believes that it is her legal right to have said premises set apart to her as aforesaid."

From an order denying the prayer of this petition, the present appeal is prosecuted.

The order setting aside the homestead in the first instance was in the nature of a final judgment that could only be set aside on motion for new trial within the time limited by law, or by motion or petition based on some statutory ground. The statutory grounds for such a proceeding are specified in Bal. Code, §§ 4953 and 5153 (P. C. §§ 424, 1033). It is manifest that the petition under consideration does not fall within any of the provisions of these sections, and the judgment of the court below is accordingly affirmed.

HADLEY, C. J., FULLERTON, CROW, MOUNT, ROOT, and DUNBAR, JJ., concur.

Feb. 1908]

Opinion Per Root, J.

[No. 6979. Decided February 11, 1908.]

WILLIAM JOHNSON, *Appellant*, v. HERBERT S. CONNER *et al.*,  
*Respondents*.<sup>1</sup>

ADVERSE POSSESSION—ENTRY UNDER CLAIM OF RIGHT—HOSTILITY OF POSSESSION. One who enters upon land in good faith, supposing it to be government land, with a view to acquiring title, may, upon discovering his mistake, proceed to hold openly and notoriously in hostility to the actual owner, so as to acquire title by adverse possession in ten years thereafter.

SAME—EVIDENCE—NONPAYMENT OF TAXES—EFFECT. The nonpayment of taxes by one in adverse possession of land is insufficient in itself to disprove an adverse holding clearly shown by other evidence.

SAME—EXTENT OF POSSESSION. Adverse possession of an entire tract is not shown where the evidence of adverse holding was confined to a portion of the tract, and there was no such occupancy or use thereof as manifested an intention to claim the balance.

PARTIES—ADDING NEW PARTIES—TRIAL—DISCRETION. In an action to quiet title, it is discretionary to deny an application by plaintiff, made after resting and after the defendants had put in part of their evidence, for leave to file a complaint in intervention on behalf of one not a party, in order to litigate the validity of a deed not questioned theretofore on the trial.

CANCELLATION OF INSTRUMENTS—FRAUD OR MISTAKE—EVIDENCE. A deed and lease will not be set aside for fraud or mistake unless the evidence is clear and convincing.

Appeal from a judgment of the superior court for King county, Albertson, J., entered February 20, 1907, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

*James B. Reavis* and *Osborne V. Willson*, for appellant.

*McBride, Stratton & Dalton, George Donworth, and Bogle & Spooner*, for respondents.

Root, J.—In the year 1883, appellant established a home upon certain lands abutting the shores of Smith's Cove, in

<sup>1</sup>Reported in 93 Pac. 914.

King county. These lands had been conveyed by the government to one Dr. Smith some years before, and he was the owner thereof at the time of the entry by appellant. The latter, however, claims that he supposed the land to belong to the government and to be subject to entry, and that he went upon the same with the intention of acquiring the title thereto under the land laws of the government. He continued to reside upon said premises until the commencement of the present suit in 1907.

In November, 1905, appellant, apparently without consideration and in trust, executed a quitclaim deed to a portion of these premises to one Czerney, who subsequently executed a quitclaim deed for the same to one Thompson for the benefit of all of these respondents. On the 26th of July, 1906, appellant and wife signed an instrument, also signed by Herbert S. Conner, wherein and whereby the latter assumed to let and lease unto appellant and wife a portion of the lands involved in this litigation. It is urged by respondents that the purpose of this lease and this quitclaim deed was to show a waiver by appellant of any claim to the premises covered by said instruments, and to quiet the title in respondents. Appellant claims that said lease was obtained from him by misrepresentation and fraud, that the deed was likewise obtained, and that he was incompetent to transact business when said instruments were executed, and did not realize or understand their purpose and effect. Respondents claim that \$25 was paid to Czerney for the quitclaim deed which he executed. The latter disputes this. The trial court found in favor of respondents upon all the material issues, and entered a decree quieting title to the premises in them. From this decree the present appeal is prosecuted.

Appellant does not claim to have entered the premises under color of title, but maintains that his entry was under a claim of right. He testified that he believed, at the time he entered the land, that it was government land and subject to

Feb. 1908]

Opinion Per Root, J.

entry, and that he located thereupon with the intention of taking it under the land laws of the United States government. Several witnesses, as to the acts and statements of the plaintiff during his early occupancy of the land, strongly corroborate him, and we do not find any evidence tending to show that he did not so believe and intend at that time. Some time after appellant located upon this land, he ascertained that the same was owned or claimed by Dr. Smith. It is impossible to tell from the evidence how long this was after his entry. It was evidently within a year or two. Dr. Smith testifies that he had some talk with appellant about the matter and gave him permission to stay there without charging him any rent. He says, however, that to the best of his recollection, the appellant occasionally brought eggs to the family, which he took to be payment on the rent.

Appellant denies positively that he ever agreed to pay any rent, or that he ever did pay any rent, or that he was a tenant of Dr. Smith, and says that the eggs were delivered to Dr. Smith and family merely as a neighborly courtesy, and especially as a return of courtesy on the part of the doctor's family in sending him berries, fish, etc. Appellant was at this time living in a building left upon the premises by persons who had theretofore been "logging off" the timber. The little evidence shown by the record as to paying rent is indefinite and does not indicate whether it was for the premises or for the use of the building, it appearing that there were several buildings or shacks upon the land and that considerable bartering, buying, selling, and leasing of these took place between Smith, plaintiff, and various other persons without much or any reference to the ownership of the land upon which the buildings stood. Whatever may have been the fact as to the rent or as to appellant's possession being permissive on the part of Dr. Smith, it is evident, that appellant's occupancy of the land soon after became hostile to the claim of Dr. Smith, and adverse and exclusive as to him and every-

body; that appellant proceeded openly and notoriously to exercise exclusive dominion over the premises occupied, and so continued to do for over ten years. He cultivated patches of garden, built some fences, engaged in the business of raising chickens, ducks, fancy dogs, rabbits, Belgian hares, and Australian rats, and kept boats for hire. He made his living there. He and numerous neighbors testified that he claimed the premises as his own and drove off people who came thereupon to hunt, camp, pick berries, locate buildings, or for other purposes. Some of the old-time neighbors testified that he told them he was holding the premises adversely and would have perfect title after ten years. Numerous witnesses testified that the place was well known throughout the community as "Dog Johnson's place."

While an entry upon the land of another, under the supposition and belief that it is government land and that the party entering may hold the same as such, may not of itself constitute an entry under claim of right, yet where such an entry is made in good faith, and the entryman upon discovering his mistake proceeds to openly and notoriously hold the same adversely and in hostility to the title of the actual owner or claimant, we think this constitutes an adverse holding and disseizin under a claim of right as understood in this state. *Moore v. Brownfield*, 7 Wash. 23, 34 Pac. 199; *Flint v. Long*, 12 Wash. 342, 41 Pac. 49; *Bowers v. Ledgerwood*, 25 Wash. 14, 64 Pac. 936; *Hesser v. Siepmann*, 35 Wash. 14, 76 Pac. 295; *Mather v. Walsh*, 107 Mo. 121, 17 S. W. 755; *Francoeur v. Newhouse*, 43 Fed. 236; 1 Cyc. 1028.

The evidence shows by a clear preponderance that appellant held actual, uninterrupted, and notorious possession of a portion of these premises adversely to everybody for a period of ten years, after he learned of Dr. Smith's claim, and after he had decided to hold adversely thereto, and prior to the date of the quitclaim deed to Czerney. It is urged that he paid no taxes. The nonpayment of taxes, while evidence against

Feb. 1908]

Opinion Per Root, J.

the holding being adverse, is nevertheless insufficient in itself to prove that the holding was not adverse when such adverse holding is clearly shown by other competent evidence. Appellant would not be expected to pay taxes as long as he thought it was government land. That he did not pay taxes afterwards is merely evidence as to intention, which is readily overcome by the other positive evidence in the case. It is not necessary that the claim of right shall continue through the statutory period, the entry being under such claim and the possession being afterwards maintained openly and notoriously in hostility to the title of the opposing claimants or real owners. After the occupant has learned of such owner's claim or title, the possession is adverse and becomes a bar to a recovery by the owner at the expiration of the ten-year period. We think, under the evidence and facts appearing in this record, that appellant conclusively shows ten years open and notorious adverse possession of these premises prior to the date of the Czerney deed and Conner lease.

It next becomes necessary to ascertain the amount of the respondents' land to which appellant thus established adverse possession, or rather to ascertain whether or not of such respondents' lands he obtained title to any other than those covered by the Conner lease and Czerney quitclaim deed. We think the evidence fails to show that he did. In this action he is claiming between thirty and forty acres of land, but we do not think that the evidence establishes an adverse claim to, and holding of, all this or any portion of respondents' lands other than those covered by the Conner lease and Czerney deed. Of course, it is not necessary for a person claiming a certain tract of land adversely to prove that he has actually occupied, used, improved, or inclosed all of said tract. But it must appear that he openly and notoriously claimed the entire tract and that his possession, use, or improvement of a portion thereof was intended to hold, not merely that particular portion, but the whole of the entire tract. We do not think

that the evidence in this case shows such occupancy, claim, use, or improvement as manifested an intention to hold any portion of the land now claimed other than that covered by said lease and quitclaim deed, which we will now consider.

The trial court apparently entertained the view that the validity of the deed to Czerney could not be questioned in this action, for the reason that Czerney was not made a party to this action. Attorneys for appellant seem not to have seriously questioned this view. After appellant had put in all of his evidence and rested his case, and after respondents had introduced a portion of their evidence, the attorneys for appellant asked to file a complaint in intervention on the part of the said Czerney, under which it would have been possible to go into all questions affecting the validity of the said quitclaim deeds. The trial court denied this application upon the ground that it came too late. The writer of this opinion thinks it might have been well to have granted this application, but the majority of the court feel that the trial court acted well within its discretion and committed no error. We are therefore confined to the evidence now before us. Upon the evidence touching the question of fraud, misrepresentation, and incompetency of appellant to make such lease and deed, the trial court found against appellant. There was much conflict in this evidence. Remembering that written instruments should be set aside for fraud or mistake only where the evidence is clear and convincing, and bearing in mind that the trial judge had the advantage of seeing and hearing the witnesses upon the stand, we are not justified from this record in setting aside his conclusion.

The judgment is therefore affirmed.

HADLEY, C. J., RUDKIN, and DUNBAR, JJ., concur.

MOUNT and CROW, JJ., concur in the result.

Feb. 1908]

Opinion Per Root, J.

[No. 6980. Decided February 11, 1908.]

W. H. HARRIS, *Respondent*, v. GREAT NORTHERN RAILWAY  
COMPANY, *Appellant*.<sup>1</sup>

CARRIERS—OF GOODS—FREIGHT RATES — LIMITATIONS — LIABILITY FOR LOSS. A schedule of published freight rates for household goods, specifying "carrier's liability limited to \$5 per hundred pounds in case of loss, so receipted for," contemplates a limitation of liability only when receipt is actually issued; and where another rate was also specified, and nothing was said by the shipper on delivering the goods and no agreement made as to the rate or limitation, and no receipt issued, the carrier's liability on loss of the goods is not limited (FULLERTON, MOUNT, and RUDKIN, JJ., dissenting).

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered April 27, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action to recover the value of household goods destroyed by fire during shipment over defendant's railway line. Affirmed.

*M. J. Gordon and Charles A. Murray*, for appellant.

*Swanson & Ripley*, for respondent.

Root, J.—This action was begun by the respondent against the appellant to recover \$1,454.10, the alleged value of household goods which were shipped by the respondent from Somers, Montana, to Spokane, Washington. Appellant's answer contained two affirmative defenses; one, that at the time the goods were shipped respondent signed an agreement accepting a lower rate for the transportation of said goods and binding himself that, in the event of loss, his recovery should not exceed the valuation of \$5 per hundred weight. The second affirmative defense set forth that defendant was engaged in interstate commerce, and kept on file, in its offices at stations along its railway, schedules of rates at which freight would be transported; that during all of the times involved,

<sup>1</sup>Reported in 93 Pac. 908; 96 Pac. 224.

such schedules were on file at Kalispell, Montana, where the contract of shipment was made for the goods in question, there being no station at Somers, Montana, and that said schedules so on file contained its rates for household furniture from Somers, Montana, to Spokane, Washington, one rate being fifty per cent lower than the other, and said lower rate being based upon the condition published in said schedules, that in the event of loss of goods shipped at said lower rate, the shipper should recover for such loss not to exceed \$5 per hundred weight; and that while said rates were so on file, the plaintiff, with knowledge of said rates and the conditions pertaining to the respective rates, caused to be shipped the goods described in his complaint from Somers, Montana, to Spokane, Washington, and at the time of delivery of said goods to the appellant for transportation, respondent requested that said goods be shipped at said lower rate, based upon said condition pertaining thereto; that the appellant accepted said goods for transportation upon said condition; that while said goods were in transit, and without any fault on the part of the appellant, they were consumed by fire; that the weight of said goods was forty-two hundred and eighty pounds, and the value, at \$5 per hundred weight, \$214, which amount appellant offered to pay and tendered into court, together with \$4 accrued costs. The case was tried to a jury and resulted in a verdict in favor of the respondent for \$1,198.85, for which sum judgment was rendered, and from which judgment this appeal is taken.

In his reply respondent denied that he signed the agreement above mentioned, and the verdict may be taken as a finding by the jury that he did not sign the agreement. Respondent, in his reply, denied that he knew of the schedule of rates being on file, or knew the condition attached. Respondent also testified that all that was said about freight or rates at the time the goods were shipped was that the freight would be paid to Spokane. It appears to be conceded that the jury found that the respondent did not sign any contract of re-

Feb. 1908]

Opinion Per Root, J.

lease. It is urged, however, by appellant that, under the interstate commerce law, the shipper was obliged to take notice of the published tariff rates of the railway company, and must be charged with the knowledge of the two rates that were provided by said tariff schedule. As to what extent the shipper or intending shipper shall take notice of the posted or published schedule of rates, we are not called upon to decide at this time. From evidence offered by appellant it appears that the schedule reads as follows:

"Household goods not for sale or speculation, individual personal effects, secondhand furniture, stoves, etc., carrier's liability limited to \$5 per hundred pounds in case of loss, and so receipted for, car load shipments prepaid guaranteed, less than car load shipments prepaid, first class rate. Household goods, not otherwise specified, not for sale or speculation, car load shipments prepaid or guaranteed, less than car load shipments prepaid, first and a half."

The clause therein "and so receipted for," would seem to indicate that the rate therein provided for should apply only where a receipt was actually issued showing the limitation of the liability. It does not appear that respondent received any such receipt or entered into any agreement whatever for a limitation of the carrier's ordinary liability. Where two rates are provided, one in contemplation of the ordinary carrier's liability, and the other a less rate by reason of a limitation of that liability, it would seem, in the absence of an understanding or agreement between the shipper and the transportation company, that the carrier would assume the ordinary liability which rests upon a common carrier of goods, and that the usual rate for carrying said goods would be the one which the law implies. In other words, the lesser rate is only available as a matter of special contract, or where it is intended and understood by the shipper and carrier to apply in a given instance. In this case it appears that the respondent delivered his goods to the appellant for shipment in the ordinary manner without anything being said, and without any arrange-

ment being made or any agreement being entered into, relative to any limitation of liability or reduction in the freight charges from the usual rate charged for ordinary shipments with the usual carrier's liability. This being true, we think the rulings of the trial court complained of were not erroneous, and that the judgment of that court is sustained by the evidence and the law. It is therefore affirmed.

HADLEY, C. J., CROW, and DUNBAR, JJ., concur.

FULLERTON, J. (dissenting)—I dissent from the conclusion reached in this case. Since there were two published rates fixing different liabilities on the carrier, the shipper had in the first instance the right of selection. But as he did not exercise that right, the duty of making the selection devolved from necessity on the carrier. When, therefore, the carrier in good faith selected the lesser rate and shipped the goods thereunder, the selection, in my opinion, fixed the rights of both of the parties. The carrier should not be permitted on a successful completion of the contract of carriage to collect the higher tariff, nor should the shipper be permitted to collect any more than the limited value in the case of a loss of the goods.

The judgment should be reversed, with instructions to enter a judgment in favor of the appellant.

MOUNT and RUDKIN, JJ., concur with FULLERTON, J.

#### ON REHEARING.

[Decided June 25, 1908.]

PER CURIAM.—Since the filing of the opinion in this case a petition for rehearing has been filed. In the former opinion we said:

“Where two rates are provided, one in contemplation of the ordinary carrier's liability, and the other a less rate by reason of a limitation of that liability, it would seem, in the absence of an understanding or agreement between the ship-

Feb. 1908]

Opinion Per Curiam.

per and the transportation company, that the carrier would assume the ordinary liability which rests upon a common carrier of goods, and that the usual rate for carrying said goods would be the one which the law implies. In other words, the lesser rate is only available as a matter of special contract, or where it is intended and understood by the shipper and carrier to apply in a given instance."

We think this should be modified, in the light of the decisions of the Federal court, to the effect that tariffs of a railway company published as required by the act of Congress become the only legal basis upon which freight and passengers can be transported, and that the shipper is as much obliged to know what the published tariff rates are as is the carrier. *Texas & Pac. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553; *Texas & Pac. R. Co. v. Mugg*, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011; *Southern R. Co. v. Harrison*, 119 Ala. 539, 24 South. 552. Hence, where the published tariff provides two rates, one with the carrier's ordinary liability and the other a lesser rate by reason of liability being limited, and the shipper makes no selection of rate, it is proper for the carrier to elect which rate shall apply. We hold, however, that the bill of lading or receipt showing the limited liability must be executed and delivered at the time the carrier accepts the shipment, or promptly mailed in due course of business before a loss occurs. The carrier cannot wait until after the goods have been destroyed and then choose to make the lower rate with the limited liability apply to the shipment.

This modification does not affect the result in this case. The judgment appealed from is affirmed.

[No. 7116. Decided February 11, 1908.]

JAMES B. GRAY, *Appellant*, v. H. H. GRANGER *et al.*,  
*Respondents*.<sup>1</sup>

APPEAL—RECORD—BILL OF EXCEPTIONS—AFFIDAVIT. An order denying a continuance cannot be reviewed on appeal where the affidavit on which it was based was not brought up by a bill of exceptions or statement of facts.

DISMISSAL AND NONSUIT—VOLUNTARY—SETOFF AND COUNTERCLAIM. The plaintiff is not entitled to dismiss his action to quiet title, claimed under a certain land contract, alleged to have been fraudulently assigned to defendant, after answer by the defendant setting up title in himself by virtue of the assignment of the contract and conveyance thereunder, and praying that his title be quieted; since the answer is a counterclaim connected with the subject of the action and arises out of the same contract or transaction set out in the complaint.

Appeal from a judgment of the superior court for Lincoln county, Warren, J., entered June 29, 1907, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

*E. T. White, Cordiner & Cordiner*, and *John C. Kleber*, for appellant.

*Neal, Sessions & Myers*, for respondents.

DUNBAR, J.—Epitomizing the pleadings in this case, the complaint alleged, that at the time of the commencement of the action and for more than fifteen years immediately prior thereto, plaintiff had been in possession of certain lands described therein; that theretofore the plaintiff had purchased said lands from the Northern Pacific Railroad Company, receiving therefor a land contract, and that the said land contract was duly paid by the said plaintiff to the said railroad

<sup>1</sup>Reported in 93 Pac. 912.

Feb. 1908]

Opinion Per DUNBAR, J.

company as therein provided; that subsequently the plaintiff borrowed from the Big Bend National Bank, of Davenport, the sum of \$610.24, and gave a note to said bank as evidence of such loan; that in order to secure the payment of the said loan, plaintiff, concurrently with the execution of said note, assigned the said contract to the said bank, for security and as security only; that subsequently the bank procured from the railroad company, under and pursuant to the terms and provisions of the contract aforesaid, a deed to said land; that the said assignment of the said contract and the said deed made under said contract were given, accepted, and held by said bank as security for said loan only, and that the real title to said land always did, and now does, vest in the plaintiff; that thereafter, to wit, on November 25, 1904, the said bank became insolvent and one Eugene T. Wilson, as receiver, took charge of its assets, and thereafter, without foreclosing the security given it by the plaintiff and without any proceedings upon the note, which had been renewed, to enforce the payment of the same and to condemn the said land for the payment of the same, conveyed the same to the defendants; alleged that such sale was null and void, and that the claim of the defendants to the land in question was without any right whatever, and that the said defendants had no estate, right, title, or interest whatsoever in or to such land or premises, or any part thereof; prayed judgment that the plaintiff be pronounced the real owner of the land; that the bank be held to have held such lands as security only for the payment of the note; that the deed by the said receiver to the defendants be declared null and void; that the said defendants be decreed to make, execute, and deliver to plaintiff a deed of conveyance to all of their right, title, and interest in said lands, or if they fail to do so, that some person be appointed by the court to execute such deed, and in the meantime that the defendants be enjoined from selling, conveying, mortgaging, or otherwise interfering with said lands.

The answer denied the material allegations of the complaint, and for an affirmative answer alleged, that the defendants, since the 14th day of October, 1905, had been the owners in fee simple of the property described in the complaint, and that since said time had been in the actual, open, notorious possession thereof; alleged the execution of the deed by the bank to the defendants; that the actual value of the property had been paid by the defendants for the land; that at the time of the purchase there were no improvements upon said premises; that the same were unfenced and unoccupied by plaintiff or any one else; that defendants, prior to the purchase of said land, went over said land and examined the same and ascertained that the same was not in the possession of any person whomsoever; that defendants nor either of them had any knowledge or information of any character from any source whatever of any claim on the part of plaintiff or any other person; that the land was purchased in good faith for a fair and reasonable consideration, relying upon the record title as shown by the county auditor's office of said county; and prayed, that plaintiff take nothing by the action; that defendants be decreed to be the absolute owners of said land; that all clouds upon the title of defendants on said property by reason of any claims to said premises be removed, and that defendants' title to said property be purged of all claims whatever by plaintiff against said property. The reply denied the affirmative matter set up in the answer.

When the case came on for trial, the plaintiff asked for a continuance, which was denied, and he then moved to dismiss his action, which was also denied by the court. The case then proceeded to trial, both the plaintiff and defendants offering testimony. Judgment was entered in favor of the defendants. The plaintiff appeals from such judgment, assigning that the court erred in denying appellant's motion for a continuance, and denying appellant's motion to dismiss the action and for judgment of nonsuit, and in entering judgment for respondents.

Feb. 1908]

Opinion Per DUNBAR, J.

The appellant's motion for a continuance was based on a purported affidavit by the appellant to the effect that one C. C. May was a necessary and indispensable witness for and on behalf of the plaintiff, and that he was not now, and had not been since the commencement of the action, a resident of the state; setting forth what he expected to prove by said witness. Motion is made to strike this affidavit from the files, which must be sustained under the uniform rulings of this court. So far as the record appears, this affidavit comes to this court without any proof of its having been a part of the record or of the statement of facts. It is true that, in the case of *State v. Vance*, 29 Wash. 435, 70 Pac. 34, affidavits used in the court below were considered on appeal, but, as expressly stated, on the ground that they constituted a part of the motion before the lower court and were referred to and identified in express terms by the court in passing upon the motion before him. This case was distinguished from the case at bar, and from former and subsequent cases in which this question has arisen, in *Chevalier & Co. v. Wilson*, 30 Wash. 227, 70 Pac. 487, where the cases were reviewed, and where it was stated that the question was settled that affidavits introduced in the lower court would not be considered on appeal unless included in the statement of facts and certificate of the trial judge.

On the second proposition, that the court erred in not allowing the plaintiff to dismiss the action and for a judgment of nonsuit, it was decided in *Waite v. Wingate*, 4 Wash. 324, 30 Pac. 81, that the plaintiff had a right to dismiss his action where the answer contained denials of some of the material allegations of the complaint, and also affirmative defenses which defendants had denominated a counterclaim, and in which title was set up in themselves, which it will be seen is substantially the condition of the case here. But this case was overruled in *Washington Nat. Building etc. Ass'n v.*

*Saunders*, 24 Wash. 321, 64 Pac. 546, where the cases were reviewed at length and where it was said:

"It is concluded that the rule announced in *Waite v. Wingate*, *supra*, is not in consonance with the spirit of the code nor in accord with the better authorities."

And in concluding the case it was said:

"It would seem inconsistent with our liberal practice to dismiss the action, and then allow the same relief upon the commencement of another action in different form."

It is contended by the appellant that the affirmative matter pleaded in the answer does not constitute a counterclaim and is not a set-off. Bal. Code, § 4912 (P. C. § 379), provides that:

"The answer of the defendant must contain:—

"(1) A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief;

"(2) A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language without repetition."

Section 4913 (P. C. § 380), says:

"The counterclaim mentioned in the preceding section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:—

"(1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action."

The subject of the action here is the title to the land in controversy, and certainly the answer of the defendants arises out of both the contract and the transaction set out in the complaint, and is very materially connected with the subject of the action. The general rule is that statutes allowing coun-

Feb. 1908]

Opinion Per DUNBAR, J.

terclaims should be construed liberally, to the end that controversies may be adjusted in a single action; and under the reform procedure adopted by this state, it would be a pernicious practice to drive parties from a court which had jurisdiction of the subject-matter and jurisdiction of the parties, to the commencement of another action in the same forum. This has been the uniform decision of this court. That the affirmative matter pleaded in the answer was so connected with the subject-matter of the plaintiff's action as to be entitled to be put in by way of counterclaim, see *Duggar v. Dempsey*, 13 Wash. 396, 43 Pac. 357; *First Nat. Bank v. Parker*, 28 Wash. 234, 68 Pac. 756; *Reynolds v. Dickson*, ante p. 407, 93 Pac. 910.

The reason assigned by appellant to sustain his contention that the affirmative answers are insufficient to constitute a counterclaim, is that it does not show any adverse claim on the part of the appellant. We think this is too narrow a construction to put upon the answer. While the answer in words does not state that the appellant has an adverse claim, the whole tenor of the answer is to the effect that he does. The complaint which brought forth the answer alleged this claim in no uncertain language, and was notice to the respondents that the appellant did claim the land in question. So that it would be doing violence to a construction of the whole record to hold that there was no allegation in the answer that the appellant alleged a claim to the land; and also the prayer of the answer, which is a part thereof, and which demanded relief from the allegations of the complaint in relation to the title to the land.

The court on the merits found all the questions of fact in favor of the respondents, finding that none of the averments of the complaint had been sustained. These findings are not excepted to. No error is discovered in the record, and the judgment will therefore be affirmed.

HADLEY, C. J., CROW, MOUNT, ROOT, FULLERTON, and  
RUDKIN, JJ., concur.

[No. 7098. Decided February 13, 1908.]

O. S. BROWN, *Respondent*, v. JAMES F. KINNEY, *Appellant*.<sup>1</sup>

APPEAL—RECORD—BILL OF EXCEPTIONS—TIME FOR SERVICE. A bill of exceptions not served within 90 days from the date of rendition of judgment will be struck out where no extension of time was given, and the judgment affirmed when no questions are presented except such as are embodied in the bill.

Appeal from a judgment of the superior court for Benton county, Zent, J., entered April 24, 1907, upon default of the defendant, in an action on contract. Affirmed.

G. A. Lane, for appellant.

J. W. Callicotte, for respondent.

PER CURIAM.—Motion is made to strike appellant's bill of exceptions or statement of facts, on the following grounds: (1) that said bill of exceptions or statement of facts was not filed or served as required by law; (2) that said bill of exceptions or statement of facts was not certified to by the judge in the court where the cause was tried; (3) that no notice was given by the appellant to the respondent as to the time or place when appellant's bill of exceptions or statement of facts would be settled by the court; (4) that no copy of appellant's certified copy of his bill of exceptions or statement of facts was returned to respondent at the time of the service of his brief. In consideration of the conclusion we have reached on the first ground of the motion, it is unnecessary to discuss the others. The judgment was rendered on the 24th day of April, 1907, and appellant's bill of exceptions was not filed or served until July 27, 1907. The record does not show that any extension of time was either asked for or granted by

<sup>1</sup>Reported in 93 Pac. 909.

Feb. 1908]

Opinion Per Root, J.

the court. Under the uniform rulings of this court, the statement of facts must be stricken.

The appeal does not present any questions for determination here excepting such as are embodied in the statement of facts. Therefore the judgment of the lower court will be affirmed.

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[No. 6961. Decided February 13, 1908.]

ELIZA WELCH *et al.*, *Respondents*, v. BEACON PLACE  
COMPANY, *Appellant*.<sup>1</sup>

TAXATION — FORECLOSURE OF LIEN — SUMMONS — DESCRIPTION OF PROPERTY — SUFFICIENCY. A summons for publication in a tax foreclosure proceeding does not describe the property with reasonable accuracy where a lot is described as in "Syndicate Add," without giving the name of any city or town, and there are in the county several syndicate additions; and judgment of foreclosure is void, where the description appears differently in the summons, judgment and deed, and the owner had no notice of the proceeding and had paid taxes for the last ten years.

Appeal from a judgment of the superior court for King county, Frater, J., entered May 22, 1907, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

*L. T. Turner*, for appellant.

*Austin E. Griffiths*, for respondents.

Root, J.—This action involves the ownership of lot 5, in block 7, of Syndicate Addition to the city of Seattle, King county, Washington. Plaintiffs, respondents here, claim as sole heirs-at-law (widow and minor child) of Patrick Welch,

<sup>1</sup>Reported in 93 Pac. 923.

who died April 14, 1903. The property was sold November 15, 1902, to King county, at the general county tax foreclosure sale, for the taxes of 1892 and prior years. It was conveyed by deed to King county May 8, 1903. Thereafter the county sold and conveyed the property to one Allen, who subsequently conveyed it to appellant. Prior to the commencement of this action, respondents tendered appellant the amount of taxes for which the property was sold, with interest to date, and demanded a conveyance of the property to them, which tender and demand were refused by appellant. Respondents brought this action in equity, and asked to have the tax proceedings declared invalid and title to the property quieted in themselves. From a decree in their favor, this appeal is prosecuted.

It appears that the property in question was at all times herein mentioned vacant, and that Patrick Welch had paid all of the taxes subsequent to 1892. Neither said Welch nor respondents appear to have received personal notice, or to have had any actual knowledge, of the delinquent taxes or foreclosure proceedings. Numerous grounds are assigned by respondents for their contention that the sale of the property under the foreclosure proceedings was void. It is urged that, by reason of the long delay of the county in bringing foreclosure proceedings, during which time the owner had annually paid his taxes without receiving any notice of the former taxes being unpaid, the county should be estopped from foreclosing for said former taxes; and it is also urged that, under Bal. Code, §§ 5504-5506 (P. C. §§ 1161-1163), the respondents acquired good title to this property as against the tax lien and those claiming under the foreclosure thereof, for the reason that they had continuously paid the taxes thereupon for more than seven years since 1892, and prior to the sale under the foreclosure proceedings.

Certain defects in the form of the summons are alleged, and it is also contended that the description of the property

Feb. 1908]

Opinion Per Root, J.

in the foreclosure proceedings was so erroneous and indefinite as to render the decree of foreclosure void. We think it necessary to discuss only the last contention. The notice and summons was headed: "The County of King, plaintiff, vs. Persons to whom assessed and all persons unknown, if any, and all persons owning or claiming to own and having or claiming to have an interest in and to the hereinafter described real property, defendant." The notice and summons then proceeds to notify all such persons that the county of King is owner and holder of the certificate of delinquency, and they were therein notified to appear within sixty days and pay the amount due or suffer judgment of foreclosure against the property. Then follows a description of a large amount of property, and on one page of the notice appear the words, "Seattle Old Limits," and on the following page, under the heading "Syndicate Add.," with a dash after it, "P. Welch, lot 5, block 7." In the application for judgment, under numerous heads, the description appears to be about this: "Syndicate Add., section or lot 5, township or block 7." The name of no city or town is given. The description appears differently in each instance, in the decree, in the deed from the treasurer to King county, and in the notice of sale by the county to Allen, the deed from the treasurer to the county being approximately correct. It is admitted by the parties that besides this "Syndicate Addition," there are in King county a "Kirkland Syndicate's First Addition to Seattle," and another known as "Kirkland's Second Syndicate Addition to Seattle."

A tax foreclosure proceeding of this character is in the nature of a proceeding *in rem*, and under the rule governing such, the property sought to be affected must be described with reasonable accuracy. The owners of this property appear to have paid their taxes regularly for many years. Why the matter was overlooked with reference to the taxes for which this foreclosure was brought, we do not know. Doubt-

less it was a mistake or oversight of some character. The owners were living in the state during all of that time. To take respondents' property from them in payment of these old and evidently overlooked taxes would be a hardship which should not be visited upon them, unless the jurisdictional requirements in the foreclosure proceeding were shown to have been fully complied with. The description of a single lot among a vast number of descriptions might easily escape an owner's notice, even if correct. If incorrect, the more easily could it be overlooked, even if the owner's attention was called to the list without suspecting that he had property mentioned therein. It is evident that the description under which this property was proceeded against was not the correct description of the property sought to be subjected to the tax lien, and we cannot say that this defect, considered together with the obscure place and form in which it appeared in the notice, was not sufficient to, or may not have misled the respondents or him under whom they claim, and cannot say that it was published in a form and possessed that accuracy and definiteness which can be said, as a matter of law, to have been sufficient to bind them with notice.

The judgment of the superior court is therefore affirmed.

HADLEY, C. J., CROW, DUNBAR, and MOUNT, JJ., concur.

RUDKIN and FULLERTON, JJ., took no part.

Feb. 1908]

Opinion Per CROW, J.

[No. 7114. Decided February 13, 1908.]

H. M. LUND *et al.*, Respondents, v. IDAHO AND WASHINGTON  
NORTHERN RAILROAD, Appellant.<sup>1</sup>

APPEAL—SUPERSEDEAS BY SUPREME COURT—COURTS—JURISDICTION—INJUNCTIONS—SUSPENSION. After an appeal has been perfected from a prohibitory injunction, the supreme court has jurisdiction to issue an order of supersedeas, where the appeal is being prosecuted in good faith and the suspension of the judgment can be granted without depriving respondents of ultimate relief; and an injunction against the operation of a railroad by a common carrier in a street abutting on respondent's lots will be suspended upon the filing of a suitable bond conditioned upon the payment of any damages sustained by reason of the suspension.

Application filed in the supreme court December 7, 1907, for an order of suspension pending appeal from a judgment of the superior court for Stevens county, Chapman, J., entered November 30, 1907, enjoining the construction and operation of a railroad in front of the plaintiff's premises. Granted.

*E. H. Belden*, for appellant.

*E. J. Cannon*, for respondents.

CROW, J.—The Idaho and Washington Northern Railroad, a corporation, acquired from the city of Newport, in Stevens county, Washington, a franchise over certain of its streets, and proceeded to construct a steam railroad across Fourth street immediately in front of certain lots belonging to the plaintiffs H. M. Lund and L. M. Lund, his wife. Thereupon the plaintiffs commenced this equitable action, in which, on final hearing, a decree was entered, enjoining the defendant corporation from constructing or operating its railroad in front of their premises, until it shall have paid to them the damages caused to their property. The defendant has appealed.

<sup>1</sup>Reported in 93 Pac. 1071.

The decree provides that, if an appeal shall be diligently prosecuted, the injunction shall be suspended pending such appeal, so as to permit the running of construction trains, but that otherwise it shall be in full force and effect from and after its entry. The appellant has petitioned this court to enter an order suspending the injunctive relief granted, until the final determination of its appeal. A show cause order having issued, the respondents have appeared and resisted appellant's application, which is now before us for consideration.

It appears that appellant's franchise from the city of Newport permits it to construct a railroad across Fourth street: that its railroad does not touch respondents' lots, being located about twenty-nine feet therefrom, and that as constructed it is neither above nor below the street grade. Respondents predicate their right to an injunction upon their contention that appellant has, in violation of § 16, art. 1, of the state constitution, damaged their private property without just compensation having been first made or paid into court. The appellant contends that it has neither taken nor damaged their property; that it is entitled to enter upon and occupy the street under its franchise granted by the city, and that it is not interfering with any private property rights which it can be required to condemn or which it has any authority to condemn. These contentions present the issue to be determined upon the final hearing of the appeal.

It appears that appellant's road has been constructed, and is now being operated, for a distance of forty-five miles or more; that in such operation it passes near respondents' lots on Fourth street; that appellant is prosecuting the business of a common carrier, but that it entered upon Fourth street without respondents' knowledge, consent, or acquiescence. The appellant strenuously contends that, if it is not permitted to continue its business as a common carrier over Fourth street pending this appeal, it will suffer great and irreparable loss, and that if a suspension of the injunction is not granted, it

Feb. 1908]

Opinion Per CROW, J.

will be compelled to settle with respondents upon their own terms, without regard to the validity of their alleged claims, and that it will thus be deprived of the fruits of its appeal, which it is now prosecuting diligently and in good faith.

The injunction is prohibitory and cannot be superseded as a matter of right under any statute of this state. We have repeatedly held that a trial court will not, by the mandate of this court, be required to fix a bond superseding a prohibitory injunction. *State ex rel. Commercial Elec. L. & P. Co. v. Stallcup*, 15 Wash. 263, 46 Pac. 251; *State ex rel. Byers v. Superior Court*, 28 Wash. 403, 68 Pac. 865; *State ex rel. Gibson v. Superior Court*, 39 Wash. 115, 80 Pac. 1108, 109 Am. St. 862.

In *State ex rel. Burrows v. Superior Court*, 43 Wash. 225, 86 Pac. 632, it was held that the superior courts of this state, in the exercise of their equitable jurisdiction, having all the powers of the English chancery court, may in their discretion suspend the operation of injunctive decrees pending appeals to this court. In the case at bar, the trial court did partially suspend the operation of its decree by permitting the appellant to run its construction trains. This concession, however, does not seem to have been entirely satisfactory to the appellant. The question now before us is whether, after the appeal has been perfected, we may, upon appellant's petition, grant a further or complete suspension. This court has held, that to maintain the existing status and to preserve the fruits of litigation to an appellant, it has, in aid of its appellate jurisdiction and in the exercise of its discretion, authority to grant a supersedeas pending the determination of an appeal, and that it may do so although the appellant is not, as a matter of right, entitled to a supersedeas under any existing statute. *State ex rel. Barnard v. Board of Education*, 19 Wash. 8, 52 Pac. 317, 67 Am. St. 706, 40 L. R. A. 317.

"The court of last resort has jurisdiction to issue an order of supersedeas to preserve the *status quo* of the parties to an

appeal pending a determination upon its merits when, for want of such an order, the appeal may be rendered of no value to the party appealing, and the judgment of the court of last resort rendered ineffective, and if it can do so without depriving the adverse party of a substantial right; and it will exercise its power only upon the terms which the statute requires for perfecting a stay in the lower court, such as that the party applying enter into a sufficient undertaking." 20 Ency. Plead. & Prac., 1237, 1238.

See, also, *Norris v. Tripp*, 111 Iowa 115, 82 N. W. 610; *Carson v. Jansen*, 65 Neb. 423, 91 N. W. 398; *Ex parte Epley*, 10 Okl. 631, 64 Pac. 18; *Eno v. New York Elevated R. Co.*, 15 App. Div. 336, 44 N. Y. Supp. 61; *Janesville v. Janesville Water Co.*, 89 Wis. 159, 61 N. W. 770; *Prante v. Lompe*, 74 Neb. 210, 104 N. W. 1510.

Such a supersedeas, however, should not be granted if it will result in preventing the respondents from ultimately securing the equitable relief to which they will be entitled in the event of an affirmance of the judgment of the trial court. We have examined the record to ascertain (1) whether the appeal is being prosecuted in good faith, (2) whether a suspension of the injunction can be granted without depriving respondents of ultimate relief should the decree be affirmed, and (3) whether we should, in the exercise of our discretion, grant the suspension or supersedeas. We conclude that all of these questions should be answered in the affirmative. We cannot, at this time, enter upon an investigation or discussion of the merits of the appeal, nor do we indicate our views thereon. We are satisfied that a suspension of the injunction should be ordered pending the appeal.

It is ordered that the petition of the appellant be granted, and that the injunction be suspended during the pendency of this appeal, and until the further order of this court; upon condition, however, that the appellant shall execute and file herein an undertaking to the respondents, to be approved by the clerk of this court, in the sum of \$5,000, conditioned that

Feb. 1908]

Statement of Case.

the appellant will pay all damages sustained by the respondents by reason of the suspension of such injunction during the pendency of the appeal.

HADLEY, C. J., MOUNT, ROOT, DUNBAR, FULLERTON, and  
RUDKIN, JJ., concur.

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[No. 6932. Decided February 13, 1908.]

BEN C. NICHOLS, *Appellant*, v. HOWARD B. DOAK *et al.*,  
*Respondents*.<sup>1</sup>

JUDGMENT—CONCLUSIVENESS—RECITALS—EVIDENCE TO CONTRADICT—BANKRUPTCY—DISCHARGE—FRAUD IN OBTAINING PROPERTY. In bankruptcy proceedings, judgments reciting that recovery was had against the bankrupt because of fraud in obtaining property are conclusive on that question, in a subsequent action by the bankrupt to restrain execution sales by judgment creditors who claimed that the discharge in bankruptcy did not affect judgments taken because of fraud in obtaining property, within § 17 of the Bankruptcy Act; and evidence to controvert the fact recited is inadmissible.

BANKRUPTCY—DECREE—FORM—ALTERNATIVE PROVISIONS—COLLATERAL ATTACK—PRESUMPTIONS. Upon a collateral attack of judgments against a bankrupt, reciting that recovery was had against him because of his fraud in obtaining property, and which ordered recovery of specified amounts for damages on account of the fraud, it will be presumed that the court found that return of the property could not be had, and the judgments are not defective in form because not in the alternative.

SAME—DISCHARGE—EFFECT OF FRAUD IN OBTAINING PROPERTY—LIEN OF JUDGMENT. Under § 17 of the Bankruptcy Act, judgments obtained in bankruptcy proceedings because of fraud of the bankrupt in obtaining property are not affected by his discharge in bankruptcy, and become liens on property thereafter acquired by the bankrupt while the judgments are in force.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered November 23, 1906, upon find-

<sup>1</sup>Reported in 93 Pac. 919.

ings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action to enjoin the sale of real property under execution. Affirmed.

*James Dawson* and *R. E. Porterfield*, for appellant.

*Samuel R. Stern*, for respondents.

HADLEY, C. J.—This is an action to enjoin the sheriff of Spokane county from selling certain real estate under execution. In two previous causes in the superior court of Spokane county, in each of which the plaintiff in this action was the defendant, judgments were rendered against him as such defendant. Thereafter he was adjudged a bankrupt, and was discharged as such. Following the date of his said discharge he inherited from his mother the real estate above mentioned. The judgments have never been paid. The holders of them in no way participated in the bankruptcy proceedings, and unless the discharge in bankruptcy had the legal effect to satisfy the judgments, they are, upon their face, liens upon the real estate. Proceeding upon the theory that the judgments are liens, the holders of them caused executions to issue, and directed the sheriff to levy upon said land and sell it to satisfy the judgments. This the sheriff was about to do when the judgment debtor brought actions to enjoin the sale, and incidentally to have the judgments cancelled. The two actions were heard together, with the same testimony applying to each, and the court denied the relief asked in each case. Judgment was entered dismissing the actions, and the plaintiff has appealed from both judgments.

The two cases will be treated on appeal as a consolidated cause, as they were treated by the trial court. Appellant contends that his discharge in bankruptcy had the effect to satisfy the judgments, and that they do not now constitute enforceable liens. Respondents, upon the other hand, maintain that the judgments were taken against appellant because of his fraud in obtaining certain property, and that by the terms

Feb. 1908]

Opinion Per HADLEY, C. J.

of § 17 of the bankruptcy act, appellant's discharge in bankruptcy did not release him from judgments or liabilities of that character. Appellant assigns as error the refusal of the court to permit him, at the trial of this cause, to introduce testimony to show that he did not fraudulently obtain and retain the goods for which said former suits were brought. The judgments themselves were in evidence, and they recited that the recovery against appellant was because of fraud in obtaining goods and the failure to return them, as alleged in the complaint. We think these recitals were conclusive against appellant. The judgments had stood for years unattacked by appeal or otherwise. To have admitted the testimony offered would have allowed the contradiction of the terms of the judgments, and would have permitted in this action a trial of the former actions upon their merits. Such would have amounted to a collateral attack on the judgments. The relief sought was the restraint of execution sales, and in order to effect that end, it was sought by the testimony to impeach the judgments which supported the executions in a particular wherein they were fair upon their face. It was not error to reject the testimony.

It is further contended, however, that the judgments were void for lack of jurisdiction, it being urged that there was no service of process upon appellant and no authorized appearance in his behalf. The court found in this action that service was made upon this appellant as a defendant in the former actions; that the complaint and summons and the affidavit and bond for the return of the property were served upon him, and that he thereafter duly appeared in the actions by Henley, Kellam & Lindsley, his attorneys; that said firm of attorneys, in pursuance of being retained by appellant to defend in said causes, filed motions to make the complaints more definite and certain, which motions were denied by the court; that they also made motion to strike certain interrogatories which had been filed, and thereafter admitted service

of notes of issue of said motions; that motions for default on account of failure to further appear and plead in the actions were made, and service thereof admitted by said attorneys; that said attorneys appeared no further in the actions because of a direction to that effect given to them by appellant. We think the above findings are all justified by the evidence. Particularly do we think the finding with reference to the authoritative appearance of appellant through counsel is abundantly supported by the testimony. The court, therefore, had jurisdiction of the person of appellant in the actions, and inasmuch as it had undoubted jurisdiction of the subject-matter, it was authorized to proceed, and the judgments are not void.

Objection is made to the sufficiency of the form of the judgments entered in the former actions. The judgments definitely recited that it appeared from proof adduced to the satisfaction of the court that the defendant, this appellant, was guilty of false and fraudulent representations in the procurement of the goods described, and that the title never passed to him as against the plaintiffs in this action. It was ordered that the plaintiff should recover specified amounts of damages on account of the fraud and the failure to return the property. The judgments are not in the best form with respect to the alternative feature of requiring the return of the property or the recovery of damages. But in this hearing they are entitled to full credit, and it should be presumed that the court must have found the return of the property impossible or impracticable and therefore entered its judgments for damages.

It follows from what has been said that the judgments are liens upon appellant's real estate, unless they have been discharged from the bankruptcy proceedings. Section 17 of the bankruptcy act provides, among other things, as follows:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . . are judgments in actions for frauds, or obtaining property by false

Feb. 1908]

Syllabus.

pretenses or false representations, . . .” 30 U. S. Stat. at Large, p. 550, § 17.

It is manifest that these judgments come within the above exception, and that they were not affected by the bankruptcy proceedings. They were in full force when appellant acquired the land in question, and they became liens thereon. The court did not err in refusing to enjoin the execution sales, and the judgment is affirmed.

FULLERTON, MOUNT, CROW, DUNBAR, and ROOT, JJ., concur.

[No. 7176. Decided February 13, 1908.]

THE STATE OF WASHINGTON, *on the Relation of Adolph Funke, Appellant*, v. BOARD OF COMMISSIONERS OF PIERCE COUNTY *et al.*, *Respondents*.<sup>1</sup>

STATUTES—TITLE—SUFFICIENCY. The title of an act “changing the title of county surveyor to county engineer, relating to the election, powers, and duties of such office,” is sufficiently broad to include the subject of his salary.

STATUTES—CONSTRUCTION. Laws of 1907, p. 351, relating to county engineers and their salaries, containing no express statement that the salary provision was intended to have immediate effect upon engineers theretofore elected and qualified, should not be held to have so intended, if it would thereby be unconstitutional.

OFFICERS—SALARIES—INCREASE — CONSTITUTIONAL LAW — COUNTY ENGINEERS. Laws of 1907, changing the title of the county surveyor to county engineer, and changing his compensation from \$5 per day for the time employed to a fixed salary per year, violates Const. art. 2, § 25, providing that the “compensation” of “any public officer” shall not be increased or diminished during his term of office, Const. art. 11, § 8, prohibiting such increase, etc., of the “salary” of “county officers” under like circumstances; as the two provisions must be construed together.

SAME—INCREASE OF DUTIES. A county engineer is not entitled to a legislative increase of his salary during his term of office be-

<sup>1</sup>Reported in 93 Pac. 920.

cause of increase of his duties, where the new duties are incidental to the functions of his office, such as making the office one of record, and requiring it to be kept open at all times as other county offices of record are kept open.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered August 23, 1907, denying to a county officer a writ of mandamus to compel a payment of salary, after a trial on the merits before the court. Affirmed.

*A. R. Warren and A. H. Denman*, for appellant.

*H. G. Rowland and Robert M. Davis*, for respondents.

HADLEY, C. J.—This is an action in mandamus to compel the payment of the salary of the county engineer of Pierce county in accordance with the statute as found in the Session Laws of 1907, at page 351. The officer was elected and qualified and was, at the time said statute became a law, discharging the duties of his office for the term for which he was elected. Prior to the law of 1907 the same office was designated as that of the "county surveyor," but in the new statute the designation was changed to that of "county engineer." The compensation provided by law for the county surveyor, prior to the law of 1907, was \$5 per day for the time actually and necessarily spent in the discharge of his duties. Bal. Code, §§ 1563-1594 (P. C. §§ 4006-4036). Under the terms of § 5 of the act of 1907, the salary of the county engineer in counties having a population of more than ten thousand is fixed at the same amount as that of the county auditor in such counties. It is conceded that, under that statute, the county engineer of Pierce county would be entitled to \$2,400 per annum, which is substantially more than he would be entitled to receive under the law in force at the time of his election and qualification. The trial court denied the writ of mandamus, and the officer has appealed.

The respondents urge that § 5 of the aforesaid act of 1907 is void by reason of the insufficiency of the title of the act.

Feb. 1908]

Opinion Per HADLEY, C. J.

The section deals with the subject of the compensation or salary of the county engineer. The title of the act is as follows: "An act changing the title of county surveyor to county engineer, relating to the election, powers, and duties of such officer and repealing sections 490 and 491 of Ballinger's Annotated Codes and Statutes of Washington." While it is true the subject of salary or compensation is not specifically mentioned in the title, yet we think the comprehensive nature of the title is sufficient to include that subject. One reading the title as relating to the "election, powers, and duties" of the county engineer, would reasonably and very logically expect the subject of his compensation to be treated in an act so entitled. That subject is germane to the general scope of the title. Respondents cite, upon this point, *Anderson v. Whatcom County*, 15 Wash. 47, 45 Pac. 665, 33 L. R. A. 137. The title of the act there in question was, "An act to provide for the economical management of county affairs." The act provided that the salary allowed to a justice of the peace should not exceed the amount of legal fees collected by such officer. It was held that such provision did not have the effect to repeal a prior act fixing salaries of justices of the peace in incorporated cities having more than five thousand inhabitants, for the reason that the subject was not embraced in the title. It is sufficient to say that the subject there was so far remote from that suggested by the title that the ordinary reader would not have suspected a repeal of the statute above mentioned. The same comment in effect also applies to the recent decision of *State v. Merchant*, ante p. 69, 92 Pac. 890, also cited by respondents. We think the cases cited are not authorities against the sufficiency of the title now before us, and we decline to sustain respondents' contention that § 5 of the act in question is void.

The chief questions presented by the appeal are (1) did the legislature intend the act of 1907 to apply to salaries of county engineers who had theretofore been elected and quali-

fied; (2) if such was intended, is the act void with respect to its salary provisions so far as officers so elected and qualified are concerned? The act in most particulars was undoubtedly intended to have immediate application upon its becoming a law. But it contains no express statement that the salary provision was intended to have immediate force, and in the absence of such, it should not be held that it was so intended if to do so would array the legislative intent against any constitutional provision. Would the immediate enforcement of the salary provision conflict with constitutional restrictions? Section 8, art. 11 of the state constitution, is as follows:

"The legislature shall fix the compensation by salaries of all county officers, and of constables in cities having a population of five thousand and upwards, except that public administrators, surveyors, and coroners may or may not be salaried officers. The salary of any county, city, town, or municipal officer shall not be increased or diminished after his election or during his term of office, nor shall the term of any such officer be extended beyond the period for which he is elected or appointed."

It is manifest from the section quoted that the salary of a county officer cannot be increased during the term of office for which he is elected. It is also manifest from the exception made in the section that the county surveyor may, or may not, be a salaried officer. It is for the legislature to say whether surveyors, public administrators, and coroners shall be compensated by salary or otherwise. It is well known that such officers are frequently compensated by fees collected by themselves for specific acts or services. Our legislature had, however, provided before the law of 1907 that the compensation of the county surveyor should be \$5 per day for the time actually and necessarily spent in the discharge of his duties, and payable from the public moneys. If that method of compensation is by salary, then it is plain from the foregoing section that it cannot be increased during the term for which the appellant was elected. Appellant contends that it is not

Feb. 1908]

Opinion Per HADLEY, C. J.

a salary for the reason that it is payable only when services are rendered, while a salary, it is contended, is a fixed compensation payable without regard to the amount of service rendered. Our legislature has, in fact, designated the surveyor's compensation as a salary. Bal. Code, § 1564 (P. C. § 4006). After naming the different officers of the county, of whom the surveyor is one, the section says, "The officers in the different counties in the state shall each receive the salary hereinafter set forth, . . . ." The sections following then state the salaries of the officers in the several classes of counties in each of which the amount for the county surveyor is \$5 per day; and § 1594 limits the amount to officers paid a per diem to the time actually and necessarily spent in the discharge of their duties. We deem it unnecessary to pursue a discussion as to whether the legislature properly designated such a compensation as a salary or not. It would be interesting to note the views of different courts as to what is technically a salary; but authorities upon that subject are not harmonious, and they are not material to the determination of this case, as will hereafter appear.

Another section of the constitution must be considered in this connection. Section 25, art. 2, provides, among other things, as follows: "Nor shall the compensation of any public officer be increased or diminished during his term of office." The above provision is so comprehensive that interpretation seems wholly unnecessary. The proposition is so simple that the statement of it carries its own argument. This provision relates strictly to what the legislative department shall not do, and it is manifest that the two constitutional provisions must be read and construed together. If the term "salary," as used in the one, has a more restricted meaning than "compensation," as used in the other, then the more comprehensive term which applies to "any public officer" must control here when we are considering what the legislature may or may not do. The term "compensation," as used seems to be

broad enough to include any kind of remuneration from the public treasury for a public officer, whether by way of what is called "salary" or otherwise.

Appellant, however, contends that this court has already held that the constitutional prohibitions do not apply to county officers who are not paid fixed sums as annual salaries, and he cites *State ex rel. Thurston County v. Grimes*, 7 Wash. 445, 35 Pac. 361. In that case the court was considering certain justices' and constables' fees. A fee bill materially reducing the fees was passed subsequent to the election, and the constitutional provision was invoked. It was held that the provision applies only to such officers as receive a fixed salary out of the public treasury, and that it does not apply to officers who receive specific fees for specific services. But one authority was cited, *Board of Supervisors v. Hackett*, 21 Wis. 620, and the reasoning of that case was adopted and followed by this court. From an examination of the Wisconsin opinion it is, we think, manifest that the court found the distinction to be between that large class of officers who are paid by fees for specific services which they usually collect themselves, and those officers who are paid from the public treasury sums specified by law. It is true the court used the term "fixed salary," but it was evidently the intention to draw a distinction merely between officers paid by fees and those paid from the public treasury. Such, in any event, was all that was involved and decided in *State ex rel. Thurston County v. Grimes, supra*. The county surveyor is not an officer paid by fees for specific services without regard to time. Under such a system he might possibly realize \$20 for services rendered on a given day, and on other days it might be more or less than that sum. As it is, his compensation is a fixed sum with reference to a specified time, is not variable during the time that official duties require his services, and it is paid from the public treasury as that of other officers. To hold that such an officer and such compensation do not come within the con-

Feb. 1908]

Opinion Per HADLEY, C. J.

stitutional prohibition would, we believe, do violence to the clear intent of the constitution makers.

Appellant further argues that he is entitled to the salary fixed by the new statute because by that law the duties of his office have been much increased and beyond what he contends really comes within the reasonable scope of the office of county surveyor. We think the new duties are all reasonably within the scope of an office of that character. It is true the office is made one of record and, in counties of ten thousand or more population, the officer must keep his office open at all times, as other county offices of record are kept open. The legislature has, however, declared that these new duties belong to the office itself, and they are in every way properly incidental to the functions of such an office.

Appellant cites the case of *State ex rel. Seattle v. Carson*, 6 Wash. 250, 33 Pac. 428, as authority for holding that for increased duties an additional salary may be provided, to be paid even to an incumbent of an office theretofore elected and qualified. The statute under consideration in that case made the individual who should occupy the office of county treasurer the collector of city taxes, and a salary of \$500 was provided for that service. It was held that the duties for which the salary was provided did not belong to the county treasurer as such, but that they were imposed upon him in the way of collecting city taxes, and were entirely outside of his duties as county treasurer for which his previous salary was fixed. For the above reason only was it decided in that case that the constitutional prohibition did not apply. Again, in *Spokane County v. Allen*, 9 Wash. 229, 37 Pac. 428, 43 Am. St. 830, the court emphasized the above view and refused to apply the rule of the former case to county attorneys whose duties had been much increased, but by new duties within the scope of the office of county attorney itself. In the recent decisions of *State ex rel. Davis v. Clausen*, 47 Wash. 372, 91 Pac. 1089, and *State ex rel. Ross v. Clausen*,

47 Wash. 607, 92 Pac. 453, statutes materially increasing the duties of the offices were involved, but it was held that the constitutional prohibition was not removed as against office incumbents during the term for which they were theretofore elected. The increase of compensation by those statutes and also by the one now before us was, no doubt, in each instance a meritorious thing for the legislature to do, having reference to future office incumbents. But the constitutional provision as to present incumbents must not be so construed in the interest of seeming expediency or even apparent necessity as shall practically amount to an evasion of the organic law. That the constitutional provision exists is not only true, but it is also true that it is so clear and is founded upon such practical wisdom as calls for no elastic effort to construe it. In *State ex rel. Davis v. Clausen, supra*, we said:

"This wise provision was no doubt intended to prevent pernicious activity on the part of the office holders of the state being brought to bear upon the members of the legislature—a wise provision which must not be construed out of existence or evaded by legislative enactment."

For the foregoing reasons we hold that appellant is not entitled to receive compensation in accordance with the new law; and furthermore that it was the intention of the legislature to provide the new compensation subject to the constitutional restriction, and for officers thereafter elected only. The superior court did not err in denying the writ, and the judgment is affirmed.

RUDKIN, CROW, MOUNT, DUNBAR, and FULLERTON, JJ.,  
concur.

Feb. 1908]

Opinion Per RUDKIN, J.

[No. 7044. Decided February 13, 1908.]

**E. WRIGHT, *Respondent*, v. E. J. LAKE, *Appellant*.<sup>1</sup>**

**PLEADING—ISSUES AND PROOF—WORK AND LABOR.** Proof that services were performed and a bill rendered therefor, which was stated to be satisfactory, sustains a recovery either on contract or on a *quantum meruit* for the services.

**MASTER AND SERVANT—DISCHARGE—NEGLIGENCE OF SERVANT.** The discharge of a superintendent of a dairy, employed for a four-year term, is justified upon the ground of negligence in the discharge of his duties, where it appears that, during the few months that he was employed, he left a wild colt attached to a wagon unhitched and unattended near a railway track, allowing the team to run away, on this and on a similar occasion no more favorable to him.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered May 16, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action on a contract of employment. Reversed.

*Voorhees & Voorhees and Cullen & Dudley*, for appellant.

*A. E. Barnes and Willis H. Merriam*, for respondent.

RUDKIN, J.—On the 26th day of September, 1905, the plaintiff and defendant entered into a written contract whereby the plaintiff agreed to give his entire time and attention to the management of a dairy business, conducted by the defendant, for a term of four years from and after October 1, 1905, at a salary of \$100 per month. The plaintiff entered upon the discharge of his duties under this contract on the 1st day of October, and continued in the employ of the defendant until the evening of December 12, 1905, at which time he was discharged. This action was thereafter instituted to recover the following items of damage: (1) The sum of \$4.70 for services performed by the plaintiff at the special instance and request of the defendant before entering upon the perform-

<sup>1</sup>Reported in 93 Pac. 1072.

ance of the written contract; (2) wages earned under the written contract prior to the discharge; (3) an item for board furnished a hired man under the written contract; and (4) damages for a wrongful discharge. A trial was had and the jury returned a verdict in favor of the plaintiff for the sum of \$279.69. The court below remitted the sum of \$3.33 from the verdict and rendered judgment for the residue. From this judgment, the defendant has appealed.

The second cause of action in the complaint was based on the \$4.70 item above referred to. The complaint alleged that the respondent performed two days labor at the special instance and request of the appellant "at the agreed and reasonable wages" of \$1.50 per day, and paid out \$1.70 car fare in going to and from the place of work. On his direct examination the respondent was asked the reasonable value of these services, but an objection to the question was sustained on the ground that the complaint alleged an express contract. At the close of the respondent's case a motion for a nonsuit was interposed as to this cause of action, on the ground that the contract was not proved as alleged. The court allowed an amendment to the complaint to conform to the proofs, and denied the motion for nonsuit. The appellant still contends that the proof offered does not sustain a recovery either on contract or on a *quantum meruit*. The respondent testified that he performed the services, that he rendered a bill to the appellant for the amount claimed, and that the appellant stated that the bill was satisfactory. This testimony, in our opinion, fully warranted the submission of the question to the jury under either the original or amended complaint. It may seem that we have given undue importance to this small item, but several pages of the appellant's brief are devoted to a discussion of it. Doubtless some question of costs in the court below hinged upon its allowance.

There seems to be no conflict in the testimony as to the second and third items. The respondent entered the employ

Feb. 1908]

Opinion Per RUDKIN, J.

of the appellant on the 1st day of October and was discharged on the 12th day of December. The wages for this period at \$100 per month would aggregate \$240, \$97.13 of which is admitted to have been paid. Board was furnished to a hired man from October 9th to December 12th at the agreed price of \$10 per month. This item would amount to \$22.12.

The only remaining question is the claim for damages for the wrongful discharge. The appellant contends that the discharge was justified for incompetency, for disobedience of orders, and for negligence in the performance of duty. While the testimony shows that the respondent had rather a superficial knowledge of the instrumentalities usually employed in the business in which the master was engaged, we are not prepared to say that the discharge was justified on this ground alone. The uncontradicted testimony also shows that the respondent disobeyed the lawful commands of the master in some minor matters, and we think some of the instructions of the court were too favorable to the respondent as to his duties in this regard, but for reasons hereafter stated this question is not material.

We are of opinion, however, that the negligence of the respondent in the performance of his duty was such as to warrant the master in discharging him. It appears that he suffered a team under his control to run away on two different occasions during the short time he was in the appellant's employ. On the first occasion he left a wild colt attached to a wagon unhitched and unattended within a few feet of a railroad track. A train passed by and the team became frightened and ran away. He attempted to justify his conduct by stating that it was not train time, that the train was a day and a half late, but it seems to us that he placed too much reliance on train schedules, and all the surrounding circumstances show conclusively that he was paying little heed to the team or the passing train. On a second occasion, a few days later, he suffered the same team to again run away under cir-

cumstances no more favorable to him. By these acts, which were manifestly negligent, he endangered not only the property of the master but the lives and property of others as well. Had injury resulted to third persons by reason of his negligence, the master would clearly be liable under the doctrine of *respondet superior*, and we do not think that the law requires the master to incur such risks or keep such a servant in his employ. We arrive at this conclusion without hesitation from the testimony of the respondent himself.

The court should therefore have withdrawn this item of damage from the consideration of the jury, and for its error in that regard the judgment is reversed, and the cause is remanded with directions to enter judgment in favor of the respondent for the sum of \$169.69, with interest from date of commencement of action.

HADLEY, C. J., DUNBAR, FULLERTON, CROW, ROOT, and MOUNT, JJ., concur.

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[No. 6831. Decided February 13, 1908.]

COLUMBIA VALLEY RAILROAD COMPANY, *Appellant*, v.  
PORTLAND & SEATTLE RAILWAY COMPANY,  
*Respondent*.<sup>1</sup>

PUBLIC LANDS—GRANTS IN AID OF RAILROADS. Act of Congress of June 26, 1906, declaring the forfeiture of all railroad rights of way theretofore granted under Act March 3, 1875, where the railroad has not been constructed and the period of five years has elapsed since its location, as provided for in the earlier act, is effective and complete as a forfeiture without any other or further proceedings on the part of the government; and the questions of fact may be inquired into by any judicial proceedings involving rights claimed under the original grant.

Appeal from a judgment of the superior court for Klickitat county, McCredie, J., entered December 31, 1906, upon

<sup>1</sup>Reported in 93 Pac. 1067.

Feb. 1908]

Opinion Per RUDKIN, J.

findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action to determine conflicting rights to a railroad right of way. Affirmed.

*W. W. Cotton, Coovert & Stapleton, and Ralph E. Moody,*  
for appellant.

*James B. Kerr and George T. Reid,* for respondent.

RUDKIN, J.—This was a controversy between two railway companies over a right of way through certain public lands of the United States, or, more properly speaking, through what were public lands of the United States at the time the rights of the plaintiff company attached. The first and fourth sections of the act of Congress of March 3, 1875, are as follows:

“Sec. (1) That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine shops, side-tracks, turn-outs, and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

“Sec. (4) That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such

lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road." 18 U. S. Stat. at Large, Part 3, p. 482.

The plaintiff company complied with the requirements of these two sections during the year 1899, by filing with the secretary of the interior copies of its articles of incorporation, proofs of its due organization, and profiles of its road as located, but failed to complete the road or any section thereof within five years after location, as required by the proviso to § 4. On the 26th day of June, 1906, an act to declare and enforce the forfeiture provided by § 4 of the act of Congress of March 3, 1875, was approved by the President. 34 U. S. Stat. at Large, p. 482. This act provides as follows:

"That each and every grant of right of way and station grounds heretofore made to any railroad corporation under the Act of Congress approved March third, eighteen hundred and seventy-five, entitled 'An Act granting to railroads the right of way through the public lands of the United States,' where such railroad has not been constructed and the period of five years next following the location of said road, or any section thereof, has now expired, shall be, and hereby is, declared forfeited to the United States, to the extent of any portion of such located line now remaining unconstructed, and the United States hereby resumes the full title to the lands covered thereby freed and discharged from such easement, and the forfeiture hereby declared shall, without need of further assurance or conveyance, inure to the benefit of any owner or owners of land heretofore conveyed by the United States subject to any such grant of right of way or station grounds: *Provided*, That in any case under this act where construction of the railroad is progressing in good faith at the date of the approval of this act the forfeiture declared in this act shall not take effect as to such line of railroad."

The court below found that the plaintiff company had not constructed its road within the five years next following the

Feb. 1908]

Opinion Per RUDKIN, J.

location thereof, and that the construction was not progressing in good faith at the date of the approval of said last-mentioned act, and concluded, as a matter of law, that all rights acquired by the plaintiff company, under the act of March, 1875, were forfeited by the act of June 26, 1906. From a judgment entered in accordance with these findings and conclusions, the present appeal is prosecuted.

The contention of the appellant is briefly this: (1) That the grant made by the first section of the act of March 3, 1875, is a grant *in praesenti*. (2) That the title vested in the appellant as soon as it filed proofs of its organization and a profile of its road with the secretary of the interior. (3) That the rights thus acquired could only be divested or forfeited by act of Congress, or by some judicial proceeding instituted by the United States in the nature of an inquest of office at common law. (4) That the act of June 26, 1906, is not sufficiently specific to work a forfeiture, because by its terms it only extends to cases where the road has not been constructed within five years from date of location, or where construction was not progressing in good faith at the date of the approval of the act, and these questions of fact can only be determined in some judicial proceeding instituted by the United States. Insofar as the rights of the appellant rest on the act of 1875, we will concede, for the purposes of this appeal, that its claims under that act are well founded. We cannot agree, however, that any form of judicial proceedings is requisite or necessary to enforce the forfeiture declared by the act of 1906. The nature of these grants and the manner in which a forfeiture for breach of condition subsequent may be declared and enforced have often been considered by the supreme court of the United States.

In *Schulenberg v. Harriman*, 21 Wall. 44, 22 L. Ed. 551, the court said:

"In what manner the reserved right of the grantor for breach of the condition must be asserted so as to restore the

estate, depends upon the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent. If the grant be a public one, it must be asserted by judicial proceedings, authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement. At common law the sovereign could not make any entry in person, and therefore, an office found was necessary to determine the estate; but, as said by this court in a late case [*United States v. Repentigny*, 5 Wall. 211] 'the mode of asserting or of resuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly under the authority of the government without these preliminary proceedings.'

In *United States v. Northern Pac. R. Co.*, 177 U. S. 435, 20 Sup. Ct. 706, 44 L. Ed. 836, the court said:

"In July, 1866, Congress granted unto the California and Oregon Railroad Company a right of way over the public lands. In a subsequent suit between the railroad company and one Bybee, a holder of a mining claim, it was claimed that the railroad company had forfeited and lost its right under the grant by its failure to complete its road within the time limited in the act; that such failure operated *ipso facto* as a termination of all right to acquire any further interest in any lands not then patented. But it was held by this court, in the words of Mr. Justice Brown: 'That in all cases in which the question has been passed upon by this court, the failure to complete the road within the time limited is treated as a condition subsequent, not operating *ipso facto* as a revocation of the grant, but as authorizing the government to take advantage of it and forfeit the grant by judicial proceedings, or by an act of Congress, resuming title to the land.'

In *Atlantic & Pacific R. Co. v. Mingus*, 165 U. S. 413, 17 Sup. Ct. 348, 41 L. Ed. 770, the court said:

"But while we think the practice of forfeiting by legislative act is too well settled to be now disturbed, we do not wish

Feb. 1908]

Opinion Per RUDKIN, J.

to be understood as saying that this power may be arbitrarily exercised, or that the grantee may not set up in defense any facts which he might lay before a jury in a judicial inquisition. It would comport neither with the dignity of the government nor with the constitutional rights of the grantee, to hold that the government by an arbitrary act might divest the latter of his title when there had been no breach of the conditions subsequent, or when the government itself had been manifestly in default in the performance of its stipulations. The inquiry in each case is a judicial one, whether there has been, upon either side, a failure to perform, and it makes but little practical difference whether such inquiry precedes or follows the re-entry or act of forfeiture."

In *Farnsworth v. Minnesota & Pac. R. Co.*, 92 U. S. 49, 23 L. Ed. 530, the court said:

"A forfeiture by the state of an interest in lands and connected franchises, granted for the construction of a public work, may be declared for non-compliance with the conditions annexed to their grant, or to their possession, when the forfeiture is provided by statute, without judicial proceedings to ascertain and determine the failure of the grantee to perform the conditions. Such mode of ascertainment and determination—that is, by judicial proceedings—is attended with many conveniences and advantages over any other mode, as it establishes as matter of record, importing verity against the grantee, the facts upon which the forfeiture depends and thus avoids uncertainty in titles, and consequent litigation. But that mode is not essential to the divestiture of the interest where the grant is for the accomplishment of an object in which the public is concerned, and is made by a law which expressly provides for the forfeiture when that object is not accomplished. Where land and franchises are thus held, any public assertion by legislative act of the ownership of the state, after default of the grantee—such as an act resuming control of them and appropriating them to particular uses, or granting them to others to carry out the original object,—will be equally effectual and operative. It was so decided in *United States v. Repentigny*, 5 Wall. 211, and in *Schulenberg v. Harriman*, 21 Wall. 44, with respect to real property held upon conditions subsequent." . . . "The only in-

convenience resulting from any mode other than by judicial proceedings is, that the forfeiture is thus left open to legal contestation, when the property is claimed under it, as in this case, against the original holders."

See, also, *Northern Pac. R. Co. v. Miller*, 20 Wash. 21, 54 Pac. 603.

From these decisions it appears manifest to us that the forfeiture declared by the act of 1906 is effective and complete, without other or further proceedings on the part of the government, and that the questions of fact upon which the forfeiture depends may be inquired into and determined in any judicial proceeding in which rights claimed under the original grant are involved. For these reasons the judgment of the court below is free from error and stands affirmed.

HADLEY, C. J., FULLERTON, ROOT, MOUNT, DUNBAR, and CROW, JJ., concur.

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[No. 7110. Decided February 13, 1908.]

GREAT NORTHERN RAILWAY COMPANY *et al.*, Appellants, v.  
SNOHOMISH COUNTY *et al.*, Respondents.<sup>1</sup>

TAXATION—LEVY AND ASSESSMENT—RAILROADS—MODE OF ASSESSMENT—EQUALITY—POWERS OF STATE TAX COMMISSION. The "general supervision" over county assessors and boards of equalization, given to the state boards of tax commissioners by Laws 1905, p. 224, is not restricted to advisory acts, but empowers the commissioners to classify intercounty railroads for the purpose of taxation and to fix the rate of assessment therefor, in view of other constitutional and statutory provisions making intercounty railroads an entirety for the purpose of assessment and requiring that the entire value be apportioned between the several counties in proportion to mileage and that the assessment be equalized between the different counties so that equality of taxation shall be secured; and an assessment of intercounty railroads by the assessor of one county, at a different and higher rate per mile than that adopted in all other counties by order of the state board of tax commissioners, is manifestly unequal and void.

<sup>1</sup>Reported in 93 Pac. 924.

Feb. 1908]

Opinion Per RUDKIN, J.

**SAME—PRESUMPTIONS.** Such an assessment cannot be sustained upon the presumption that all other property in such county was assessed proportionally higher than in other counties, in view of the requirement that property be assessed at its true value.

**STATUTES — LEGISLATIVE CONSTRUCTION.** A legislature has no power to construe the act of its predecessor, and no such construction is attempted where the act in question was reenacted without change, and other provisions adopt an entirely new system of procedure.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered July 27, 1907, upon sustaining a demurrer to the complaint, dismissing an action to enjoin the collection of taxes excessively assessed against railway property. Reversed.

*L. C. Gilman, B. O. Graham, and M. J. Gordon (R. C. Saunders, of counsel), for appellants.*

*G. D. Eveland and Cooley & Horan, for respondents.*

RUDKIN, J.—The complaint in this action alleges substantially the following facts: That the plaintiff the St. Paul, Minneapolis & Manitoba Railway Company is a corporation, organized and existing under the laws of the state of Minnesota, and is duly authorized to do business in the state of Washington; that said plaintiff is the owner of a line of railway extending from St. Paul, in the state of Minnesota, to the city of Everett in Snohomish county, in the state of Washington; that of said line of railway there lies within said Snohomish county 43.92 miles of main track and 14.17 of side track; that the plaintiff Seattle & Montana Railway Company is a corporation organized and existing under the laws of the state of Washington; that said plaintiff is the owner of a line of railway extending from the city of Seattle to the city of Blaine, in the state of Washington; that of said line of railway there lies in Snohomish county 43.04 miles of main track and 15.48 miles of side track; that all of said lines of railway belonging to the plaintiffs the St. Paul, Minneapolis

& Manitoba Railway Company and the Seattle & Montana Railway Company are used, occupied and operated by the plaintiff Great Northern Railway Company, a corporation, organized and existing under the laws of the state of Minnesota, as a part of its general system of railway lines extending from the cities of St. Paul and Duluth, in the state of Minnesota, to the cities of Seattle and Blaine, in the state of Washington, under contracts and arrangements requiring said last named company to pay the taxes assessed against said properties; that in the exercise of the power conferred upon it by law, the state board of tax commissioners of the state of Washington, for the purposes of assessment and taxation for the year 1906, classified the different railroad properties owned and operated within the state, and by said classification the railroads above described were classified as follows: Main line tracks of the St. Paul, Minneapolis & Manitoba Railway Company as "First Class"; main line tracks of the Seattle & Montana Railway Company from its connection with the St. Paul, Minneapolis & Manitoba Railway Company near Everett Junction south to the county line of Snohomish county, as "First Class"; main line tracks of the same company from Everett Junction north to the county line, as "First Class B"; that said state board of tax commissioners fixed the assessment for said year, for the purposes of taxation on railroad tracks of the first class, at the sum of \$14,520 per mile; on rolling stock of railroads of the first class at \$3,168 per mile; on railroads of the first class B, at \$10,560 per mile; and on the rolling stock thereon at \$2,640 per mile; that said valuation above mentioned was so fixed by said state board of tax commissioners in relation to, and based upon, the comparative value of all other lines of railway throughout the state, and proper directions and instructions were by said board made and given to the various county assessors in counties through which plaintiffs' said lines of railway extended in the state of Washington, including the assessor of said Snohomish county, so as to pro-

cure and secure equality and uniformity of assessment and taxation in the various counties of the state through which said lines of railroad extend, and to secure equality and uniformity in the valuation for assessment of the various lines of railroad throughout the respective counties of the state; that in conformity with, and in obedience to, the directions and instructions of the state board of tax commissioners, the county assessors of all counties along the lines of said railroads, except the assessor of Snohomish county, assessed the property of the plaintiffs on the classification and rate per mile thus fixed by the state board of tax commissioners; that the assessor of Snohomish county wrongfully and unlawfully assessed the tracks designated as first class at \$25,900 per mile, the rolling stock thereon at \$3,960 per mile, the tracks designated as first class B at \$19,000 per mile, the rolling stock thereon at \$3,300 per mile; and, therefore, plaintiffs' said properties have been assessed for taxation for the year 1906 at a valuation disproportionate to all other railroad property in the state, and at a valuation relatively greater than the other railroad property in the state has been assessed for said year; that the board of equalization of Snohomish county wrongfully refused to reduce said assessment; that the taxes on said properties for the year 1906, on the valuation fixed by the assessor and board of equalization, are \$26,108.32 in excess of the taxes based on the valuation of the state board of tax commissioners; that the plaintiffs have tendered, and stand willing to pay, all taxes and assessments against said property, less said excess of \$26,108.32, and that the treasurer of Snohomish county refuses to accept the same.

The prayer of the complaint is for an injunction against the collection of such excess, and for general relief. A demurrer to this complaint was sustained, and the plaintiffs electing to stand on their pleading and refusing to plead further, a judgment of dismissal was entered, from which this appeal is prosecuted.

Section 2 of art. 7 of the constitution provides that:

"The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money, and shall prescribe such regulations by general laws as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his or her or its property."

Section 32 of the revenue act of 1897, Laws 1897, p. 150, provides that:

"The value of the 'railroad track' shall be listed and taxed in the several counties in the proportion that the length of the main line track in such county bears to the whole length of the road in the state, except the value of the side or second track, and all turnouts, and all station houses, depots, machine shops, or other buildings belonging to the road, which shall be taxed in the county in which the same are located."

Section 34 provides that:

"The rolling stock shall be listed in the several counties in the proportion that the length of the main track used or operated in such county bears to the whole length of the road used or operated by such person, company or corporation, whether owned or leased by him or them in whole or in part."

Section 42 provides that:

"All property shall be assessed at its true and fair value in money. In determining the true and fair value of real or personal property, the assessor shall not adopt a lower or different standard of value because the same is to serve as a basis of taxation; nor shall he adopt as a criterion of value the price for which the said property would sell at auction, or at a forced sale, or in the aggregate with all the property in the town or district; but he shall value each article or description of property by itself, and at such sum or price as he believes the same to be fairly worth in money at the time such assessment is made. The true cash value of property shall be that value at which the property would be taken in payment of a just debt from a solvent debtor."

Feb. 1908]

Opinion Per RUDKIN, J.

The second subdivision of § 2 of the act creating the state board of tax commissioners, Laws 1905, p. 224, provides that:

"The commissioners shall have the power, and it shall be their duty: . . . Second. To exercise general supervision over assessors and county boards of equalization, and the determination and assessment of the taxable property in the several counties, cities and towns of the state, to the end that all taxable property in this state shall be placed upon the assessment rolls and equalized between persons, corporations and companies in the several counties of this state, and between the different municipalities and counties therein, so that equality of taxation shall be secured according to the provisions of existing laws."

While these several provisions bear more or less directly on the question under consideration, the case turns principally on the meaning of the term *general supervision* in the act defining the powers and duties of the state board of tax commissioners. From these provisions, constitutional and statutory, we think it is manifest: (1) That the main track and rolling stock of a railway extending through two or more counties in this state are an entirety for the purpose of assessment and taxation; (2) that the entire value of such main track and rolling stock must be apportioned between the several counties through which the road passes, in the proportion that the mileage in each of such counties bears to the entire mileage in the state; (3) that such main track and rolling stock must be assessed at their true and fair value in money; (4) that the assessment shall be equalized as between the different counties so that equality of taxation shall be secured according to the provisions of law; and (5) that the state board of tax commissioners is given general supervision over assessors and county boards of equalization to that end.

Inequality in the assessment of the property of the appellant companies, as between the different counties in the state, is apparent on the face of this record. Counsel for respondents suggest that the assessor and taxing officers of Snohom-

ish county may have placed a proportionately higher value on all other property in their county, and that the apparent inequality does not necessarily exist, but, in the face of the statute requiring all property in all counties to be assessed at its true and fair value in money, we cannot indulge in any such speculations or presumptions. The state board of tax commissioners is given general supervision over assessors and county boards of equalization, to the end that all taxable property shall be placed on the assessment rolls and equalized as between the different counties and municipalities so that equality of taxation shall be secured according to the provisions of law.

What is meant by *general supervision*? Counsel for respondents contend that it means, to confer with, to advise, and that the board acts in an advisory capacity only. We cannot believe that the legislature went through the idle formality of creating a board thus impotent. Defining the term "general supervision" in *Vantongerren v. Heffernan*, 5 Dak. 180, 38 N. W. 52, the court said:

"The secretary of the interior, and, under his direction, the commissioner of the general land office has a general 'supervision over all public business relating to the public lands.' What is meant by 'supervision?' Webster says supervision means "To oversee for direction; to superintend; to inspect; as to supervise the press for correction." And, used in its general and accepted meaning, the secretary has the power to oversee all the acts of the local officers for their direction; or as illustrated by Mr. Webster, he has the power to supervise their acts for the purpose of correcting the same; and the same power is exercised by the commissioner under the secretary of the interior. It is clear, then, that a fair construction of the statute gives the secretary of the interior, and, under his direction, the commissioner of the general land office the power to review all the acts of the local officers, and to correct, or direct a correction of, any errors committed by them. Any less power than this would make the 'supervision' an idle act,—a mere overlooking without power of correction or suggestion."

Feb. 1908]

Opinion Per RUDKIN, J.

Defining the like term in *State v. Fremont etc. R. Co.*, 22 Neb. 818, 35 N. W. 118, the court said:

"Webster defines the word 'supervision' to be 'The act of overseeing; inspection; superintendence.' The board therefore, is clothed with the power of overseeing, inspecting and superintending the railways within the state, for the purpose of carrying into effect the provisions of this act, and they are clothed with the power to prevent unjust discriminations against either persons or places."

It seems to us that the term "general supervision" is correctly defined in these cases. Certainly a person or officer who can only advise or suggest to another has no general supervision over him, his acts or his conduct. The respondents contend that such a construction will substantially do away with county assessors and county boards of equalization, but this conclusion does not follow. How far the state board of tax commissioners may interfere with the local authorities in the valuation of local property for the purpose of local taxation, or how far the legislature may authorize such interference, is not involved in this case.

It is lastly contended that the legislature of 1907 has placed a legislative construction on the act of 1905, *supra*. In the first place the legislature of 1907 had no power to construe the act of its predecessor insofar as it related to past transactions, and in the second place, we fail to find wherein such legislative construction has been given. The section of the act of 1905 above quoted was reenacted without a change in 1907, Laws 1907, p. 508, and other provisions of the 1907 laws adopt an entirely new system for the assessment and taxation of railroad property. Laws 1907, p. 132. But we fail to find in all this any legislative construction of the act of 1905.

On the record before us we hold that there is a manifest inequality in the assessment of the properties of the appellant companies as between the different counties of the state for 1906, that the state board of tax commissioners acted within

its jurisdiction when it fixed the value of intercounty railroads for the purpose of taxation, and that the acts of the Snohomish county officials in disregard of the lawful orders and directions of their superior officers were void and of no effect.

The judgment of the court below is therefore reversed, with directions to overrule the demurrer.

HADLEY, C. J., FULLERTON, CROW, ROOT, and MOUNT, JJ., concur.

[No. 7188. Decided February 13, 1908.]

J. W. KESTER, *Appellant*, v. SCHOOL DISTRICT No. 34 OF  
WALLA WALLA COUNTY, *Respondent*.<sup>1</sup>

SCHOOLS AND SCHOOL DISTRICTS—TEACHERS—ELIGIBILITY—ACTIONS—WAGES—CERTIFICATE AS CONDITION PRECEDENT. Under Bal. Code, §§ 2322 and 2416, requiring a certificate as a condition precedent to the right to enter upon an employment as a school teacher and providing the necessary steps to obtain the same, a letter from the county superintendent stating that a teacher's papers are sufficient to entitle him to a certificate and that one will be issued on application as provided by statute, is not the equivalent of a certificate, and an action for wages will not lie where at the time of making the contract and entering upon the service no certificate had been obtained.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered August 23, 1907, upon findings in favor of the defendant, dismissing an action by a school teacher to recover upon a contract of employment. Affirmed.

W. B. Mitton and Brooks & Bartlett, for appellant.

Rader & Barker, for respondent.

<sup>1</sup>Reported in 93 Pac. 907.

Feb. 1908]

Opinion Per RUDKIN, J.

RUDKIN, J.—In the latter part of January, 1907, the plaintiff entered into a contract with the defendant school district whereby the plaintiff undertook to teach in the school of the district for the remainder of the school term at a salary of \$100 per month. On the 5th day of February, 1907, the plaintiff presented himself and requested that he be allowed to enter upon the discharge of his duties as such teacher, but such request was refused by the defendant. At the time the plaintiff entered into the contract to teach and at the time he presented himself and offered to enter upon the performance of his duties, the only certificate or authority to teach possessed by him was the following letter from the county school superintendent of Walla Walla county: "Telegram received this morning. Your papers are sufficient to entitle you to a temporary certificate, which will be granted upon application as per statute." On the foregoing facts the court below entered a judgment of dismissal, from which the present appeal is prosecuted.

Bal. Code, §§ 2322 and 2416 (P. C. §§ 7282, 7387), provides as follows:

"Sec. 2322. No person shall be accounted as a qualified teacher, within the meaning of the school law, who has not first received a certificate issued by the superintendent of public instruction, or who has not a state certificate or life diploma from the state board of education, or who has not a temporary certificate or a special certificate granted by the county superintendent according to law: Provided, That nothing in this section shall be construed as invalidating any certificate in force at the time of its passage, but the same shall remain in force for the period for which each was issued."

"Sec. 2416. Any teacher to whom a certificate has been granted by any county board of examiners in this state, or by lawful examiners in any state or territory, the requirements to obtain which shall not have been less than the requirements to obtain a certificate in this state, or any teacher holding a diploma or certificate of graduation from any state or territorial normal school, or from the normal department

of the university of the state of Washington, may present the same, or a certified copy thereof, to the county superintendent of any county in this state where said teacher desires to teach, and it shall be the duty of said county superintendent, upon such evidence of fitness to teach, to grant to said person a temporary certificate: Provided, That the provisions of this clause shall apply only to such teachers as were not residents of the county at the time of the last preceding examination, or were not able, by reason of sickness or other unavoidable cause, to attend said examination: And provided further, That the county superintendent may require of such a person a written statement of such facts, verified by affidavit."

Under these sections an action to recover salary or wages as a school teacher will not lie unless the plaintiff shows that he or she is regularly licensed to teach as provided by law. *Kimball v. School District No. 122*, 23 Wash. 520, 63 Pac. 213.

It seems to us too plain to admit of argument that a mere letter from a county school superintendent stating that an applicant's papers are sufficient to entitle him to a temporary certificate, and that such certificate will be granted on application as provided by statute, is not the equivalent of a temporary certificate. Where a certificate is required as a condition precedent to the right to enter upon an employment or exercise a privilege, a promise to grant the certificate on application will not satisfy the requirements of the law.

The judgment of the court below is therefore affirmed.

HADLEY, C. J., DUNBAR, FULLERTON, CROW, ROOT, and MOUNT, JJ., concur.

Feb. 1908]

Statement of Case.

[No. 7158. Decided February 14, 1908.]

JOHN KENDALL *et al.*, *Respondents*, v. BILL JOYCE *et al.*,  
*Appellants*.<sup>1</sup>

WATERS—APPROPRIATION—PRIORITIES—DILIGENCE. The rights of a settler upon public lands to divert the waters of a creek for the purpose of irrigation relate back to the date of the original appropriation, where the same was applied to beneficial uses with reasonable diligence.

SAME—NOTICE OF APPROPRIATION—EFFECT. There being no law authorizing the filing of a notice of appropriation of waters on public lands, a settler acquires no rights by settlement on the land and filing such notice in 1887, where no diversion of the water or application to beneficial uses was made until 1897, when the same had already been duly appropriated by another.

SAME—FAILURE TO POST NOTICE. The failure of an appropriator of waters on public lands to post and record a notice of appropriation as required by Laws 1891, p. 327, does not affect the rights of an actual appropriator as against one subsequently acquiring title, the law being simply to apprise other contemplating appropriators of the first steps taken, and to preserve evidence thereof.

SAME—WHO ENTITLED TO—SQUATTERS—STATUTES—CONSTRUCTION. Laws 1889-90, p. 706, assuring riparian rights for the purpose of irrigation to persons holding possessory rights to land abutting on natural streams, is simply declaratory of the existing law whereby title acquired under a patent relates back to the date of settlement; and does not enable a squatter, who abandons or sells out his possessory rights, to acquire any riparian rights, which are a mere incident to ownership of the soil and do not vest until patent issues.

Appeal from a judgment of the superior court for Okanogan county, Steiner, J., entered July 1, 1907, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, enjoining the diversion of the waters of a stream appropriated and used for irrigation purposes. Affirmed.

<sup>1</sup>Reported in 93 Pac. 1091.

*E. W. Taylor, J. W. Graham, and Harold Preston, for appellants.*

*A. W. Barry, for respondents.*

RUDKIN, J.—This was a controversy between two land owners over the right to use the waters of Johnson creek, a small stream flowing into the Okanogan river, in Okanogan county, for irrigation purposes. The rights of the respective parties are predicated upon the following facts: In the year 1895 the plaintiff John Kendall, a citizen of the United States above the age of twenty-one years, settled upon lots 3, 4, and 5, and the southwest quarter of the southeast quarter of section 25, and lot one and the northwest quarter of the northeast quarter of section 36, township 35, north, range 26 E., W. M., under the homestead laws of the United States. The lands embraced within the settlement were at that time unsurveyed public lands of the United States. Kendall continued to occupy and cultivate his claim from date of settlement until September 11, 1903, at which time he received a homestead patent therefor. Commencing with the year 1895 he diverted the waters of Johnson creek for the purpose of irrigating his orchard and meadow lands and for stock and domestic purposes. He increased the amount of his cultivated land from year to year until 1905, when he had fifty-five or sixty acres under irrigation and cultivation. The testimony showed that he proceeded in good faith and with reasonable diligence in bringing his land under cultivation and in applying the waters diverted to beneficial uses.

In the year 1877 one Philip Perkins settled upon the lands now owned by the defendants. On the 9th day of October of that year Perkins filed a notice of claim of water right with the county auditor of Okanogan county, claiming five hundred inches of water from Johnson creek at a certain point, and an additional five hundred inches at a certain other point. He continued to occupy the claim until about the year 1889,

Feb. 1908]

Opinion Per RUDKIN, J.

when he was succeeded by one Warren Perkins. The latter occupied the claim until 1897, when he was succeeded by William Maretta, and Maretta in turn was succeeded by the defendant Joyce, in the year 1899. Joyce has since derived title to the original Perkins claim, in part under the homestead law and in part by scripping. Prior to the year 1897, not to exceed five or six acres of the Joyce lands were irrigated or cultivated. Under these facts the court below awarded to the defendants a prior right to use the water of the creek to the extent of seven miner's inches, measured under a four-inch pressure; to the plaintiffs one-third of one cubic foot per second of time, subject to the prior right of the defendants to the seven miner's inches; and enjoined the defendants from diverting the waters of the creek to the injury of the plaintiffs. From this judgment the defendants have appealed.

Under the facts stated, the respondents having diverted the waters of the creek in 1895 and applied the same to beneficial uses with reasonable diligence, their rights relate back to the date of their original appropriation. *Offield v. Ish*, 21 Wash. 277, 57 Pac. 809; *Longmire v. Smith*, 26 Wash. 439, 67 Pac. 246, 58 L. R. A. 308. It is equally apparent that Perkins acquired no rights by filing the notice of claim of water right in 1887. There was then no law authorizing such a notice. The notice was too indefinite to subserve any purpose, and the notice was not followed by a diversion of the water and its application to beneficial uses within a reasonable time. If, therefore, the rights of the parties depend upon the law of prior appropriation, it is manifest that the rights of the respondents are superior to those of the appellants except as to the quantity of water awarded to the latter by the court below. The appellants contend that the respondents acquired no rights as appropriators by reason of their failure to post and record a notice of their appropriation as required by the act of March, 1891, Laws of 1891, page 327, but,

"The statutes requiring the posting and recording of a notice are not intended to change the rule as to what consti-

tutes a valid appropriation, but simply, by requiring an appropriator to post and record a notice, to apprise other persons contemplating the diversion of water from the same stream that the appropriator has taken the first step toward securing his rights, and also to preserve the evidence thereof. It is accordingly held that, notwithstanding the existence of these statutes, a valid appropriation may be made by an actual diversion and use of the water without posting any notice; and one who fails to comply with the statute requiring notice, but actually diverts and uses the water, acquires a good title in the absence of any conflicting adverse rights, and cannot be deprived thereof by another who complies with the statute at a time subsequent to the former's completed diversion. Thus the failure of an actual appropriator of water upon the public domain to post a notice as required by law does not affect his right to the water as against one subsequently acquiring the land from the government." 17 Am. & Eng. Ency. Law (2d ed.), p. 498.

The appellants further contend that they acquired certain rights under § 2 of the act of March 4, 1890, Laws of 1889-90, page 706, as successors in interest of Warren Perkins who was occupying the land at the date of the passage of that act. The section referred to reads as follows:

"All persons who claim, own, or hold a possessory right or title to any land, or parcel of land, within the boundary of the state of Washington, when such lands, or any part of the same, are on the banks of any natural stream of water, shall be entitled to the use of any water of said stream, not otherwise appropriated, for the purposes of irrigation to the full extent of the soil for agricultural purposes."

This section was simply declaratory of the existing law, viz., that title acquired under a patent from the United States relates back to the date of settlement or filing. *Sturr v. Beck*, 133 U. S. 541, 10 Sup. Ct. 350, 33 L. Ed. 761. It has never been contended that a mere squatter on public land who subsequently sells out or abandons his claim acquires, or can acquire, riparian rights in a stream flowing through the land. Riparian rights are a mere incident to ownership in the

Feb. 1908]

Syllabus.

soil, and, while they may relate back by fiction of law to the date of settlement or filing, by virtue of the patent subsequently issued, yet they do not vest until patent issues, for up to that time the title to the land with all its incidents is vested in the United States, utterly beyond the power or control of state legislatures. And the party thereafter acquiring title from the government acquires the land with all its incidents. We are therefore of the opinion that the respondents have a valid claim to the waters awarded them by the court below, superior to any claim on the part of the appellants, and the judgment is accordingly affirmed.

HADLEY, C. J., FULLERTON, DUNBAR, MOUNT, and CROW, JJ., concur.

[No. 7167. Decided February 14, 1908.]

JOHN O'CONNOR, *Appellant*, v. BESSIE SLATTER,  
*Administratrix of the Estate of John Slatter,*  
*Deceased, Respondent.*<sup>1</sup>

WITNESSES — COMPETENCY — TRANSACTIONS WITH DECEASED. A widow, defending as executrix of her deceased husband's estate, does not waive her right to object to evidence by the adverse party as to transactions with the deceased by the fact that she fully testified to the same, since under our statute her testimony was competent and not barred by the statute.

SAME. The prohibition of the statute against the evidence of an adverse party as to transactions had with a person deceased does not exclude evidence as to who was or was not present at the time certain notes were endorsed by the deceased.

APPEAL—REVIEW—CORRECTION OF ERROR BY ADMISSION OF OTHER EVIDENCE. Error in excluding evidence of a witness to contradict evidence of the adverse party that she was present at a certain transaction, is not cured by testimony of the witness theretofore admitted enumerating the persons who were present without any mention of the party claimed to be present.

<sup>1</sup>Reported in 93 Pac. 1078.

**WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEASED.** Testimony by the adverse party as to whether notes had been changed since he received them from a person since deceased, is inadmissible, because testimony of a transaction had with the deceased, being indirectly testimony as to their condition when received from the deceased.

**APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS—BILLS AND NOTES—ENDORSEMENT.** In an action upon promissory notes endorsed by defendant's decedent, in which the question of liability as endorser was not involved, an ambiguous instruction, to the effect that endorsement and delivery were necessary to transfer complete title to the note, is not prejudicial error, in the absence of a request for more specific instructions as to the necessity and purpose of an endorsement.

**BILLS AND NOTES—GUARANTEE—PLEADING—ANSWER—FRAUD—IMMATERIAL ISSUES.** In an action upon a written guarantee of a note, which was denied by the answer, an affirmative answer admitting an endorsement in blank and alleging that the written guarantee was thereafter fraudulently stamped on the note and setting forth the fraudulent means whereby the endorsement in blank was secured and the previous fraud perpetrated on the defendant, adds nothing to the denials of the answer, and it is error to submit the affirmative defense to the jury, no affirmative relief having been asked.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered October 14, 1907, upon the verdict of a jury rendered in favor of the defendant, in an action on promissory notes. Reversed.

*Merritt, Oswald & Merritt*, for appellant.

*Roche & Onstine*, for respondent.

**RUDKIN, J.**—This case was before this court on a former appeal where a full statement of the issues will be found. 46 Wash. 308, 89 Pac. 885. A retrial resulted in a verdict and judgment in favor of the defendant, from which the present appeal is prosecuted.

The principal errors assigned on this, as on the former appeal, relate to the rulings of the court on the admission of testimony. On the former appeal it was contended that the

Feb. 1908]

Opinion Per RUDKIN, J.

surviving wife was not a competent witness to testify to a transaction between a third person and her deceased husband in an action brought by such third person against the surviving wife as executrix of the deceased husband's estate. This contention we refused to sustain. It is now contended that by testifying fully to such transaction the surviving wife waived her right to object to the competency of the adverse party to testify to the same transaction. This proposition, thus broadly stated, we likewise refuse to sustain. Cases have been cited from other jurisdictions sustaining the contention of the appellant in this regard, but they are all based on statutes differing materially from the statute of this state. As said by us on the former appeal:

"No statute exactly like ours has been called to our attention by the parties to this appeal, and upon independent investigation we have been unable to find any using the same language in the same order as ours. The authorities in other states upon similar statutes shed but very little light upon the question presented here."

Doubtless one of the objects of the statutes is, "To prevent interested parties from testifying to transactions and statements made by a deceased person when there might be no person to rebut such testimony," as declared in the former opinion, but manifestly the operation of the statute does not depend upon whether there are, or are not, others who may testify to the transaction or statement. Death has sealed the lips of one of the parties and the statute imposes the same silence upon the other. The prohibition of the statute is absolute and unconditional. It admits of no qualification or exception, and it is not the province of this court to add to it or take from it. We are satisfied, therefore, that the court below correctly ruled that the appellant was not competent to testify to any transaction had with or statement made by the deceased, regardless of the testimony that may have been given by other witnesses.

The prohibition of the statute, however, extends only to transactions had by the appellant with the deceased, or to statements made to the appellant by the deceased. It does not extend to every fact to which the deceased might testify if living, and we are satisfied that the court below extended the prohibition too far. The respondent testified that she was present at the appellant's bank when the notes in suit were endorsed, and testified fully to all that transpired there. The appellant was called as a witness in his own behalf, and was asked the following question: "I will ask you to state whether or not this defendant was present at the time the notes in suit were endorsed by John Slatter?" To this question an objection was interposed and sustained on the ground that it related to a transaction with a deceased person. This ruling was plainly erroneous. The testimony was important as it tended directly to contradict the testimony of the respondent previously given, and by no possible rule of construction can it be held that the testimony offered related to a statement made by or transaction had with the deceased. Nor was the error cured by the following testimony admitted before the respondent had testified:

"Q. I will ask you who was present at the time John Slatter signed his name on these notes?" A. Myself, John Slatter, Charles Graves and James O'Connor."

By a process of elimination the jury might determine from this answer that the respondent was not present, but the testimony did not have the force or effect of a direct denial that she was present after she had testified in her own behalf. The appellant was further asked whether the notes had been changed since he received them from the deceased. This, in our opinion, was an indirect way of asking what their condition was when received from the hands of the deceased, and was a palpable attempt to evade the statute. The objection was therefore properly sustained. It is contended that other testimony was excluded tending to show statements made by

Feb. 1908]

Opinion Per RUDKIN, J.

the respondent and transactions had with her and not with the deceased, but what we have said will be a sufficient guide for the court on a retrial.

The court charged the jury as follows: "In order to complete title—to transfer the title—it was necessary that the person holding the note must place his name upon the back of it and deliver it to the purchaser"; and the giving of this instruction is assigned as error. The instruction is at least ambiguous. No doubt a promissory note may be transferred without endorsement, the same as any other article of personal property, either under our statute, Laws 1899, p. 349, § 49, or independent of statute. At the same time there is, or may be, a vast difference between the rights of the parties under a transfer made with or without endorsement. The question of the liability of an endorser was not involved in this case, however, and we are unable to say that the instruction was prejudicial. If the appellant desired a more specific instruction on the question of the necessity for or purpose of an endorsement, he should have requested it.

The appellant finally contends that inconsistent defenses were interposed. The issues in the case are well summarized in the respondent's brief as follows:

"Appellant sued the respondent as the administratrix of an estate, upon a written contract of guaranty, wherein he alleges that the deceased in his lifetime guaranteed in writing the payment of certain promissory notes which he sets out in full, by signing a written guaranty indorsed on the back of said notes. The respondent answers admitting the execution of the notes and that he indorsed them in blank and delivered them to the appellant, but denies that the contract of guaranty was upon the notes at the time he indorsed them. Respondent then alleges fraud as an affirmative defense, by setting forth the following facts: that the deceased in his lifetime was the owner of a sum of money which he delivered to the appellant as his agent, and that appellant, as such agent, agreed to loan said money, for deceased, upon good real estate security and take properly executed notes and mortgages therefor so that

deceased's money would be well secured; that the deceased was a man of no education and experience with business methods, especially loaning money; that appellant was a banker and shrewd business man and agreed with the deceased that he would loan his money for him upon good real estate security and that deceased fully trusted the appellant and relied implicitly upon the honor and ability of the said appellant in all their transactions; that appellant shortly after he had received the decedent's money to loan, gave to decedent the promissory notes mentioned in appellant's complaint, which were made payable to decedent, and then and there informed him that said notes were well secured by real estate mortgages upon farm lands in Lincoln county, and that said decedent believing the statements of appellant to be true and relying upon them, accepted said notes from appellant; that after said notes had been delivered to said decedent, said appellant sold to said decedent certain real estate and as a part payment therefor decedent indorsed in blank and delivered to appellant all of said notes except the note mentioned in appellant's first cause of action, and that at the time decedent indorsed said notes in blank and delivered them to appellant, appellant informed decedent that by indorsing his name in blank on said notes he was merely transferring his interest in said notes to appellant and was incurring no liability thereon; that at the time decedent indorsed said notes he believed that said notes were secured by good real estate mortgages, and that the indorsement of decedent upon said notes was procured by appellant with a fraudulent design of holding decedent responsible therefor; that decedent never knew during his lifetime that said notes were not secured by good real estate mortgages; that in truth and fact none of said promissory notes were secured by mortgages of any kind and that said appellant did not, in fact, loan said decedent's money, but that appellant, who was then booming the town of Downs, contracted to sell the makers of said notes certain real estate in Downs for exorbitant and unreasonable prices, taking a small cash payment, which he put in his pocket and then accepted these notes in lieu of the balance of said purchase price which notes he turned over to decedent in lieu of decedent's money which he had agreed to loan as aforesaid for decedent; the appellant at all times holding the title to said real estate which he had agreed to sell as aforesaid, in his own name and said contracts

Feb. 1908]

Opinion Per RUDKIN, J.

of sale being oral contracts entered into by appellant and the makers of said notes, and that appellant thereby appropriated decedent's money to his own use; that some time after said notes had been delivered to appellant and indorsed in blank by decedent, the appellant by means of a stamp placed a printed guaranty above the name of the decedent; that the promissory note mentioned in appellant's first cause of action was delivered to appellant for collection, appellant informing said decedent at the time he received said note for collection that it was necessary for decedent to indorse his name on the back thereof in order that he could collect the same for decedent and that thereafter appellant wrongfully placed the stamp of guaranty above his signature and claimed to be the owner thereof."

We cannot say that these defenses are inconsistent, but it seems to us that the affirmative matter adds nothing to the previous denials. The action was brought on a written guarantee, and if there was no such guarantee the action must fail. The affirmative matter was not set forth as a basis for affirmative relief, and the fact that the appellant obtained a blank endorsement from the deceased by fraudulent means, or the fact that the appellant had perpetrated some previous fraud on the deceased, would seem utterly immaterial. In other words, if the guarantee set forth in the complaint was never executed, any different transaction between the parties as a matter of pleading was irrelevant. The fraud alleged was not connected with the contract in suit. *Puget Sound Iron Co. v. Worthington*, 2 Wash. Ter. 472, 7 Pac. 882, 886; *Trumbull v. Jackman*, 9 Wash. 524, 37 Pac. 680; *Williams v. Ninemire*, 23 Wash. 393, 63 Pac. 534; *Peterson v. Seattle Traction Co.*, 23 Wash. 615, 63 Pac. 539, 65 Pac. 543, 53 L. R. A. 586.

For the error in excluding testimony and submitting the affirmative defense to the jury, the judgment is reversed and a new trial ordered.

HADLEY, C. J., DUNBAR, MOUNT, FULLERTON, and CROW, JJ., concur.

[No. 6822. Decided February 14, 1908.]

JAMES A. MERRIMAN *et al.*, *Respondents*, v. S. W. THOMPSON  
*et al.*, *Appellants*.<sup>1</sup>

BROKERS—LIABILITY TO PRINCIPAL—ORAL APPOINTMENT—SALE BY AGENT—EVIDENCE—SUFFICIENCY. The evidence is sufficient to show that real estate brokers acted as agents for the owners in selling land for \$2,500, and representing to the owners that they received only \$2,000, and the brokers are therefore liable to the owners for the balance retained by them, where it appears that the brokers had written authority to sell for the owners for a limited time, that after expiration of such time, they were given oral authority to sell for \$2,500, with five per cent commissions, and after negotiating a sale for said amount, wired an offer of \$1,900 and represented that \$2,000 was the best offer they could obtain, deed being made reciting such sum as consideration in reliance on the representations; and it is immaterial on the question of agency that the brokers had no written authority as required by statute to enable them to claim commissions.

Appeal from a judgment of the superior court for Clarke county, McCredie, J., entered February 7, 1907, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for money received. Affirmed.

*Edgar M. Swan* and *A. L. Miller*, for appellants.

*E. M. Green*, for respondents.

Root, J.—This is an action by plaintiffs to recover a balance of \$475, collected by defendants on the sale of a forty-acre tract of land. From a judgment in favor of the plaintiffs, this appeal is taken by defendants.

Respondents, in writing, appointed appellants their agents to sell the land referred to, the latter doing business as real estate agents in Vancouver, Washington. The time within which they were authorized to make the sale expired. Subsequently they gave appellants no written authority to sell,

<sup>1</sup>Reported in 93 Pac. 1075.

Feb. 1908]

Opinion Per Root, J.

but told them orally that, if they could get a purchaser for \$2,500, they would pay them five per cent commission. Afterwards they, by letter, authorized appellants to sell it for \$2,250. Some time after this appellants sent to respondent James A. Merriman this message: "Will give \$1,900 for your claim if accepted now. Wire answer." In response to this telegram, respondent Merriman called appellants over the long-distance telephone from Seattle and talked with appellant Swan. There is a conflict as to what was said over the telephone. Merriman testified that he was led to believe that they were selling the property as his agents to some other person, and that the price mentioned was the highest amount that could be obtained on a sale, and that he consented thereto under these circumstances. Appellants drafted a warranty deed wherein the consideration was mentioned as \$2,000, and wherein one Gregory was named as grantee. This deed was sent to respondents to be executed, and was returned by them, after execution, to a bank in Vancouver, to be delivered upon payment of the purchase price. In the meantime appellants had sold the property to one Gregory—in fact, had negotiated with him for a sale for \$2,500 prior to the time of sending the telegram to respondents.

It is contended by respondents that appellants were their agents, and that they relied upon the representations of such agents in executing and delivering the deed; that as such agents they were holden to make a full disclosure to respondents of all the facts concerning the contemplated sale. Appellants urge that they were not the agents of respondents; that under the statutes of this state they could not be such agents except under a written appointment, which they did not have, the time covered by the former appointment having expired. Mr. Gregory testified that respondents, in selling the property to him, told him that it belonged to Mr. Merriman, and that he understood that Merriman was asking \$2,500. Respondent Merriman says that, in the telephone con-

versation, he asked respondent Swan if the amount mentioned in the telegram was the best he could do, and Swan said that it was, and said, "We have a contract lying on the table for \$2,000; that is all the man will give."

If the facts were as stated by Merriman, it would seem very clear that appellant Swan was talking as an agent to Merriman, and that the basis of their negotiations was the relationship of principal and agent. The testimony of Gregory, as well as certain admissions on the part of the appellants, tends to corroborate and strongly support the theory of respondents. The jury hearing the evidence and having the parties and witnesses before it, accepted respondents' theory, and the record is not such as to justify us in disturbing its conclusion. The fact that there was not in writing an employment of appellants as agents for respondents might have a bearing upon the question of their commission. But we do not think the lack thereof would justify appellants, after selling this property for \$2,500, in retaining the difference between that and \$2,000, which was the amount they represented to respondents as being the highest sum they could get for the property, and for which they had sold, or were about to sell, the same. *Stearns v. Hochbrunn*, 24 Wash. 206, 64 Pac. 165.

The judgment of the superior court is affirmed.

DUNBAR, RUDKIN, FULLERTON, and MOUNT, JJ., concur.

HADLEY, C. J. and CROW, J., took no part.

Feb. 1908]

Opinion Per Root, J.

[No. 6881. Decided February 14, 1908.]

ALFRED G. GULLICKSON, *Respondent*, v. THOMAS L. FENLON  
*et al.*, *Appellants*.<sup>1</sup>

**ATTACHMENT—LIEN.** The lien of an attachment of real estate is merged in that of the judgment when the latter is entered.

**HOMESTEAD—ABANDONMENT.** Where debtors removed from their real estate upon which they had lived, and went to another state, secretly selling their personal property or removing the same, with intent to establish their residence in such other state and to defraud their creditors, they cannot, after attachment, return to the premises and claim a homestead exemption thereon by living on the premises for a month, no effort to set aside the attachment being made prior to sale on execution, and the return to the premises not being made in good faith; Bal. Code, § 5254, providing that the exemption shall not apply to such persons.

Appeal from an order of the superior court for Snohomish county, Black, J., entered February 27, 1907, confirming a sale of real property on execution, after a trial on the merits before the court. Affirmed.

*Hathaway & Alston*, for appellants.

*John W. Miller* and *Robert McMurchie*, for respondent.

Root, J.—This is an appeal from an order confirming the sale of certain real property. Appellants purchased these premises about May, 1904, and lived thereupon until September, 1905, when they removed therefrom and subsequently, in November, 1905, left the state. While they were absent this action was commenced on February 6, 1906, an attachment in the action being levied the same day upon these premises. Judgment was obtained and the property sold under an execution issued thereupon, the sale occurring on the 7th day of July, 1906. In the month of April, 1906, appellants returned to the state of Washington, and on the 26th of May,

<sup>1</sup>Reported in 93 Pac. 1074.

1906, filed a declaration of homestead upon these premises, and on that day, rented and placed in the building thereon certain household goods, and resided in said building until the 22d of June, 1906.

It is contended by respondent that the appellants left the state of Washington in November, 1905, with the intention of establishing their residence in the state of Oregon, and that they did so establish their residence; that they so left the state of Washington with intent to defraud their creditors, having secretly sold the greater portion of their household goods and effects and shipped the remainder to Portland, Oregon. The trial court made findings to this effect. Appellants contend that these findings are not justified by the evidence. We think they are. No effort was ever made to set aside the attachment, and the same merged with the lien of the judgment when the latter was entered in the case. Bal. Code, § 5254 (P. C. § 847), among other things, says:

“That nothing in this chapter shall be construed to exempt from attachment or execution the property, real or personal, of nonresidents, of a person who has left or is about to leave the state with intent to defraud his creditors.”

The trial court moreover found that the appellants' action in going upon the premises in May, 1906, and remaining there for only a month was not in good faith with the intention of making said premises their home, but merely as a subterfuge to defeat the sale of the premises in satisfaction of respondent's judgment. Considering all of the facts in the light of the statute above quoted, we do not think the lien of the attachment and judgment was defeated by the attempt made by appellants to claim this property as a homestead exemption.

The judgment of the superior court is therefore affirmed.

DUNBAR, RUDKIN, FULLERTON, and MOUNT, JJ., concur.

HADLEY, C. J. and CROW, J., took no part.

Feb. 1908]

Opinion Per RUDKIN, J.

[No. 7046. Decided February 17, 1908.]

EMMA PETERSON *et al.*, *Appellants*, v. UNION IRON WORKS,  
*Respondent*.<sup>1</sup>

MASTER AND SERVANT—NEGLIGENCE—CAUSE OF ACCIDENT—DEATH—EVIDENCE—SUFFICIENCY. The evidence is insufficient to establish the cause of the accident whereby the operator of a rip saw was killed, and a nonsuit is properly granted, where it appears that there was no witness to the accident, that the deceased had been struck in the abdomen by some blunt instrument, leaving a mark such as could have been made by a board which was found in close proximity to the deceased's position in operating the machine, which board had indentations indicating that it might have been caught and thrown by the saw by reason of failure to guard the saw with a splitter, and where it was only by inference that it could be said that the saw was being operated by the deceased at the time of the accident.

SAME—EVIDENCE—ADMISSIBILITY—RE MOTENESS. In an action for the death of an operator of a rip saw, where there was no direct evidence of the cause of the accident and at most only an inference that a board might have been caught and thrown by reason of lack of a guard or splitter, evidence of a defect in the saw table is inadmissible as too remote.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered February 21, 1907, granting a nonsuit, after a trial before the court and a jury, in an action for the death of a servant, the operator of a rip saw. Affirmed.

*A. E. Barnes, Geo. A. Latimer, and B. M. Branford*, for appellants.

*Post, Avery & Higgins*, for respondent.

RUDKIN, J.—The defendant is a manufacturing corporation having its principal place of business in the city of Spokane. At the time hereinafter mentioned it had installed in its establishment a rip saw used by its employees in the manufacture of flasks used in moulding. The saw was twelve

<sup>1</sup>Reported in 93 Pac. 1077.

inches in diameter, and was situated upon, or attached to, a table about three feet in width and five feet in length, so that about four inches of the saw blade extended above the surface or plane of the table. It is customary to equip or guard saws such as this with a device known as a "splitter." The splitter consists of a piece of iron or steel, about the thickness of the saw blade, placed in an upright position, four inches back of the saw, the top of the splitter extending nearly to the top of the saw. The object of the splitter seems to be two-fold; first, to keep the board from pinching after it passes through the saw, and second, to prevent slivers and other material from catching on the saw at the rear, or dropping upon the saw and being hurled against the operator. The saw in question was not equipped with a device of this kind.

On the 25th day of August, 1905, one Nels Peterson was in the employ of the defendant, and was engaged in operating this saw. While thus engaged, he received an injury which resulted in his death some four or five days later. At the time the accident happened, the deceased was alone in the carpenter shop, and no living witness saw the accident or could explain how it happened. Indeed, it is only by inference that we can say that the saw was in motion or that the deceased was engaged in operating it at the time of receiving his fatal injury. An examination of the person of the deceased after the injury disclosed the fact that he had been struck in the abdomen by some blunt instrument which left a mark about four inches in length and one inch wide. A piece of a board about one by four inches and four feet in length, used in the manufacture of the flasks, was found after the accident in close proximity to where the operator would ordinarily stand in the discharge of his duties. This board had some indentations upon it, indicating that it might have been caught by the teeth of the saw and hurled against the deceased. These were the only facts or circumstances tending in the remotest way to show the cause of the accident or how it happened.

Feb. 1908]

Opinion Per RUDEKIN, J.

The theory of the plaintiffs was that the piece of board above described dropped or caught on the teeth of the revolving saw and was hurled against the deceased, and that the accident would not have happened had the saw been properly equipped and guarded. They contended, and now contend, that the jury might properly infer this from the testimony. The court below ruled otherwise, and granted a nonsuit, and from the judgment of nonsuit the present appeal is prosecuted.

In their brief the appellants make the following concessions: "The evidence in this case showed that the deceased was alone in said carpenter room at the time of the accident; hence, there is no living witness who saw the accident and can explain from his observation of same how it happened." Again: "So in this case there may have been a dozen or more different ways in which a similar piece of board might have come in contact with this saw and would have caused the same to be hurled back against the operator. A board might, for example, be dropped from his hand directly on top of the saw, either crosswise or otherwise, and be turned back against him, even though there had been a splitter behind the saw, and one can imagine various other reasonable ways that an accident might happen, even though a saw had been equipped with a splitter." Yet, in the face of these concessions, which are manifestly in accordance with the facts, the appellants earnestly insist that the jury might have adopted their theory of the accident, and that the inference to be drawn from the facts was exclusively for that body. With this contention we cannot agree. In *Patton v. Texas & Pac. R. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, the court said:

"The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirmative fact for the injured employee to establish that the employer had been guilty of negligence. . . . That in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And when the testimony

leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

This rule has frequently been applied in this court: *Hansen v. Seattle Lumber Co.*, 31 Wash. 604, 72 Pac. 457; *Armstrong v. Cosmopolis*, 32 Wash. 110, 72 Pac. 1038; *Reidhead v. Skagit County*, 33 Wash. 174, 73 Pac. 1118; *Stratton v. Nichols Lumber Co.*, 39 Wash. 323, 81 Pac. 831.

The court rejected testimony tending to show an alleged defect in the saw table, but the inference that the injury was caused by any such defect is even more remote than the inference we have been discussing. In view of the conclusion we have reached on the merits of the case, we will not consider or discuss the appellants' right to maintain this action under the factory act.

The judgment of the court below is affirmed.

HADLEY, C. J., DUNBAR, ROOT, MOUNT, FULLERTON, and CROW, JJ., concur.

Feb. 1908]

Statement of Case.

[No. 6806. Decided February 18, 1908.]

PORTLAND AND SEATTLE RAILWAY COMPANY, *Respondent*, v.  
CLARKE COUNTY, *Defendant*, and COLUMBIA  
CONTRACT COMPANY, *Appellant*.<sup>1</sup>

**EVIDENCE—DOCUMENTARY—MAPS.** In a condemnation proceeding, maps showing the location of the railroad are admissible as illustrative of the evidence of the witnesses, where they are shown to be accurate by witnesses who had scaled the maps and compared them with the government field notes, although such witnesses had not surveyed the ground or made the maps.

**EMINENT DOMAIN—HIGHWAYS—ESTABLISHMENT.** Upon assessment of damages for the condemnation of lands abutting on a public highway, it is immaterial whether the owner's rights in the use of the roadway are based upon establishment of the highway by prescriptive use or by dedication.

**SAME—TRIAL—INSTRUCTIONS—CONSISTENCY.** In such a case, an instruction that no owner of land adjoining a public highway has a right to interfere with public travel, and an instruction that he may make temporary and reasonable use thereof for the purpose of loading and unloading goods, are not prejudicially inconsistent, when construed together.

**SAME—DAMAGES—INSTRUCTIONS—VALUE OF LANDS.** In proceedings to condemn a railroad right of way through lands upon which there was a stone quarry on a bluff adjacent to a highway, it is proper to refuse to instruct that there was no evidence that the highway depreciated the value of the lands, where it appeared that care was required in blasting in the quarry near the highway, and it was claimed by defendants that much greater care would be necessary in blasting after construction of the railway.

**SAME—ADEQUACY OF DAMAGES—REVIEW.** A verdict for \$15,000 damages for land taken for a railroad right of way will not be set aside on appeal as inadequate, where there was much conflict in the evidence, the jury and judge viewed the premises, and the trial court denied a motion for a new trial, and the verdict appears to do substantial justice.

Appeal by a defendant from a judgment of the superior court for Clarke county, McCredie, J., entered December 31,

<sup>1</sup>Reported in 93 Pac. 1083.

1906, upon the verdict of a jury awarding damages in a condemnation proceeding. Affirmed.

*Teal & Minor and Donald McMaster*, for appellant.

*A. L. Miller and James B. Kerr*, for respondent.

MOUNT, J.—This appeal is from an award of damages in condemnation. The respondent condemned a right of way for railway purposes across certain lands of the appellant. The question of damages was tried to the court and a jury, and a verdict was returned in favor of the appellant for \$15,000. The strip of land taken lies along the north bank of the Columbia river between the river and a steep bluff. The appellant for several years last past has operated a stone quarry along the face of the bluff. The stone was carried from the bluff to the river by means of tramways. The right of way of the railway company lies between the bluff and the river. A public road passes over the appellant's premises between the bluff and the river, crossing the right of way near the west end of the premises and paralleling the right of way on the side next to the bluff, until near the east end where the road comes in contact with the right of way, and from there on is included within the right of way. The tramways above mentioned cross the right of way and the wagon road on trestles built sufficiently high so as not to interfere with either the roadway or the operation of the railway trains. Appellant alleges that the court erred in receiving in evidence certain maps similar to those in the case of *Portland & Seattle R. Co. v. Ladd*, 47 Wash. 88, 91 Pac. 573. The point made in this case is identical with the one made there. For the reasons there stated, it was not error for the court to receive these maps in evidence.

At the request of the respondent, the court instructed the jury, as follows:

"A public road may be established in this state by user. It is the law of this state that any road or highway which has

been continuously, openly, notoriously, and adversely used as a public road or highway by the general public under a claim of right for ten years, where the same has been worked and kept up at the expense of the public, is a lawful road or highway, and the public has a right to pass to and from thereon. If you find from the evidence that a public road exists below the quarries referred to in the evidence, you are entitled to take that fact into consideration in determining the damages which will be sustained by the claimants by the taking of a strip of land which is necessary for the railroad right of way. No owner of land adjoining a public highway has a right to interfere with public travel upon such highway. If, therefore, you find that a public highway exists below the quarries in question, you may consider whether the taking of a right of way by the railroad company will interfere with the manner in which the claimant is now entitled to operate its stone quarries. Where a public road or highway exists and slight changes have been made in portions thereof, the remainder of such road still continues to be a public road or highway and the rights are the same therein as if such changes had not been made, provided, of course, the travel is substantially the same as before the making of such changes. You are instructed that when a public road or highway has been established, either by user or otherwise, it remains such public road until vacated according to law, or until abandoned for the time fixed by the statute, and no person has a right to change such road unless such change is directed or consented to by the authorities having charge of such road."

At the request of the appellant, the court charged the jury as follows:

"If you find that a highway or county road has been established over the claimants' lands, the claimants as the owners of said lands have, notwithstanding the establishment of the highway or county road, the exclusive right to the soil, subject only to the easement of the right of passage in the public and the incidental right of properly fitting the highway or county road for public use. Subject only to the easement or right of passage, and the incidental right of properly fitting the highway or county road for use, which is vested in the public, the proprietor of the soil, the claimants in this

case, has all the usual rights and remedies of the owner of the freehold. The owner of lands abutting upon a highway or county road, such as the claimants in this proceeding, has the right to sink drains and put in subways, carry pipes, and use the soil of such highway or county road for any lawful purpose so long as he shall maintain the surface so that it may be safe and convenient for the passage of the public. The owner of lands abutting on a highway or county road, such as the claimants in this proceeding, may also build overhead crossings, tramways and bridges over the highway or county road, and maintain and use the same for any lawful purpose so long as the same do not render the passage of the public on such highway or county road unsafe or inconvenient. The owner of lands abutting on a highway or county road, such as the claimants in this proceeding, may use the highway or county road for the purpose of loading and unloading goods, merchandise, and other things bought for use or for sale on his lands, and for the purpose of loading the produce of his lands, or building or other materials thereon, or of taking the same therefrom, so long as he does not use the highway or county road for such purposes for an unreasonable time and so long as such use is temporary and he does not obstruct the highway or county road for an unreasonable period. He may even temporarily encroach upon the highway or county road for such purpose, and the use of the highway or county road by the public for travel may be temporarily interfered with by him in this way, but such use must be temporary and reasonable. The owner of lands abutting on a highway or county road, such as the claimants in this proceeding, may blast stone and other substances on his lands in close proximity to such highway or county road, or fell timber on his said lands, even though some stone or material may be thrown upon the highway or county road; but he must restore the highway or county road with reasonable dispatch, and remove the stone or material thrown thereon, and not permit the public travel to be unreasonably interfered with thereby. If you find from the evidence that the public has traveled over the land described in the petition for years, I charge you that such use in law establishes a highway or county road over said lands, even though there has been no dedication or appropriation of the lands for this purpose, but the public's right to a highway or county road established by

Feb. 1908]

Opinion Per MOUNT, J.

user in this way and for such period, the width of the highway and the extent of the servitude or public right to use the same, is limited to the ground so used and the character of the user."

The appellant also requested the court to charge the jury upon this subject as follows:

"I charge you that there is no evidence in this case from which you may find that any of the lands of the claimants described in the petition have been dedicated to or appropriated by the public for use as a public highway or county road. I instruct you, gentlemen of the jury, that there has been no evidence introduced in this cause tending to show that the wagon road over the lands of claimant does in any way affect or depreciate the value of the property in question, whether said road is or is not a county road or public highway."

It is argued, first, that the court should have told the jury that whatever rights the public have in the highway are based wholly upon user and not dedication by the owner, for the reason that the evidence clearly shows that fact. We are inclined to agree that the evidence shows clearly the establishment of a highway by user for nearly fifty years, the only difference among the witnesses being that in certain places changes have been made by reason of necessity, the road sometimes becoming flooded or filled by debris or rock placed in the road by the operation of the stone quarry by the agents of the appellant. There seems to have been no dispute that the wagon road was there. Whether it was established by user or by dedication could therefore make no difference.

"The fact of the existence of a public highway may be established by any competent evidence, and there is no distinction in the validity of either method of the establishment of a public highway in this state." *State v. Horlacher*, 16 Wash. 325, 47 Pac. 748.

Appellant also argues that the instructions given are inconsistent with each other. It is true the court told the jury

that "no owner of land adjoining a public highway has a right to interfere with public travel upon such highway," and thereafter that "the owner of lands abutting upon a highway . . . may use the highway . . . for the purpose of loading and unloading goods . . . so long as such use is temporary . . . but such use must be temporary and reasonable," etc. These instructions must all be construed together, and so construed we think they are not subject to the criticism that they are inconsistent. If any error is shown, it is not error prejudicial to the appellant.

It is next argued that the court should have instructed the jury that there was no evidence that the wagon road over the appellant's lands affected or depreciated the value of the lands. We think it was not error to refuse this instruction, because the appellant claimed at the trial that great damage would result by the construction of the railway, for the reason that blasting operations would be largely interfered with, and much greater care would be required to prevent stone from injuring trains and the railway. The wagon road which lies between the railway and the quarry would, of course, necessitate some care to prevent injury to travelers, and would tend for that reason to lessen the value of the property as a quarry. The jury certainly had a right to consider this fact so as not to charge against the railway the whole expense of extraordinary care in the operation of blasting or in the operation of the stone quarry. There were other reasons of a like nature, but the one just stated justified the court in refusing the requested instruction.

Appellant next argues that the verdict was too small. There was great diversity of opinion among the many witnesses as to the amount of damages caused by the taking of the right of way and the construction of the railway. The question was properly one for the jury. The jury heard all the evidence, viewed the premises, and was properly instructed as to the measure of damages. The trial judge accompanied

Feb. 1908]

Statement of Case.

the jury upon the view, heard all the evidence, and was familiar with all the facts in the case, and after verdict, denied a motion for new trial. After reading the record, we are satisfied that the verdict returned is not too small, but that it does substantial justice between the parties.

The judgment must therefore be affirmed.

DUNBAR, ROOT, and RUDKIN, JJ., concur.

HADLEY, C. J. and CROW, J., took no part.

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[No. 6738. Decided February 19, 1908.]

SPOKANE INTERURBAN RAILWAY COMPANY, *Respondent*, v.  
EDWARD CONNELLY, *Appellant*.<sup>1</sup>

EMINENT DOMAIN—PROCEEDINGS—NOTICE—PROOF OF SERVICE—PROCESS—SUPPLEMENTAL PROOF. It is discretionary on motion to quash a service of notice in condemnation proceedings for inadequate proof, to permit the filing of a supplementary affidavit showing proper service, where the first affidavit was technically insufficient in that the party making the service was shown to be twenty-one years of age when sworn, and not when the service was made, two days earlier.

SAME—JURISDICTION ON DEFECTIVE PROOF—STATUTES—CONSTRUCTION. In condemnation proceedings, Bal. Code, § 5638, providing that due proof of service of notice must be filed before or at the time of presenting the petition, does not affect the jurisdiction of the court to allow the filing of further proof of service to cure a technical defect, where the party had been actually duly served, in view of the further provision that all persons served with notice shall be bound by subsequent proceedings.

Appeal from an order of the superior court for Spokane county, Huneke, J., entered March 23, 1907, refusing to quash service of notice and vacate a judgment of appropriation in proceedings to condemn land for a railway right of way. Affirmed.

<sup>1</sup>Reported in 93 Pac. 1082.

*P. F. Quinn*, for appellant.

*Hamblen, Lund & Gilbert*, for respondent.

CROW, J.—The Spokane Interurban Railway Company, a corporation, commenced this action to condemn a right of way over land of the defendant, Edward Connelly. After the entry of judgments decreeing a public use, awarding damages, and appropriating the land, the defendant appeared specially and moved the court to quash the notice and set aside the judgments, for the reason, that no proper service had been made; that no proof thereof had been filed, and that the court had not obtained jurisdiction. Thereupon the plaintiff moved for leave to file an amended or supplemental affidavit showing legal service on the defendant. The trial court overruled the defendant's motion to quash, but granted plaintiff's motion for filing a supplemental affidavit. The defendant has appealed.

It is not contended by the appellant that he had not been actually served with a copy of the original notice which was properly filed, although no proof of service was attached thereto. The decree adjudging a public use, which was entered on December 24, 1906, recited that personal service of the notice and a copy of the petition had been made on the appellant in Spokane county, as required by law, and on January 19, 1907, the final decree of appropriation was entered. The appellant's motion to quash was made February 9, 1907, and on February 14, 1907, the following proof of service was filed:

"R. H. Macartney, being first duly sworn upon oath, deposes and says that he is a citizen of the United States, over the age of twenty-one years, competent to be a witness in the above entitled action, and is not interested therein; that on the 14th day of December, 1906, he served the petition and notice in the above entitled action upon Edward Connelly, the above named defendant, by delivering to and leaving with the said defendant in Spokane county, Washington, a true

Feb. 1908]

Opinion Per Crow, J.

and correct copy of the original petition and notice in said cause."

This affidavit was made December 16, 1906, and fixes the date of service as December 14, 1906. Appellant now contends the service was void, citing *French v. Ajax Oil & Development Co.*, 44 Wash. 305, 87 Pac. 359. In that case we said:

"It is the contention of the appellant that due service was not made in this case, for the reason that it does not appear from the affidavit of Allen that he was twenty-one years old at the time the service was made, the affidavit going only to the extent that he was twenty-one years old at the time he made his affidavit, viz., on the 27th day of December, 1905, the service having been made on December 2, 1905. Technical as this may appear, this objection is sustained by authority, and literally there is no proof or showing that the summons was served by a person who was competent under the law to serve it."

The objection certainly is a technical one. The vital question is whether personal service was actually made by a qualified person, and not whether an affidavit was filed making proof thereof in strict compliance with the statute. The respondent in this case supplemented the record with an affidavit showing that Mr. Macartney was over twenty-one years of age when he made the service, and the trial court properly exercised its discretion in permitting respondent to file such supplemental proof.

In *State ex rel. Thomas v. Superior Court*, 42 Wash. 521, 85 Pac. 256, a condemnation proceeding, this court, in passing on a similar objection, interposed to a proof of service, said:

"There are two affidavits making proof of service. In the first, it affirmatively appears that copies of the petition and summons were left with each of said relators. The second affidavit was made to show that the party who made the service was qualified. These two affidavits are sufficient proof of a valid service, none of their statements being denied by the relators."

Substantially the same conditions are now before us, and we hold the service and amended proof thereof sufficient. The appellant cites Bal. Code, § 5638 (P. C. § 5103), and contends that the trial court had no jurisdiction of his person or the subject-matter of the action, when the several orders and decrees were made and entered, as no proper affidavit or proof of service had then been filed. Although the section cited provides that due proof of service shall be filed with the clerk of the superior court before or at the time of the presentation of the petition, we hold that failure to make such prior filing will not deprive the court of jurisdiction where legal service has actually been made by a competent and qualified person: the provision above mentioned being directory rather than mandatory. We reach this conclusion from the language immediately following, to wit:

*"Want of service of such notice shall render the subsequent proceedings void as to the person not served; but all persons or parties having been served with notice as herein provided, either by publication or otherwise, shall be bound by the subsequent proceedings."*

This language clearly indicates that jurisdiction to enter valid orders and decrees depends upon actual service made, and not upon the act of filing proof of the same. If appellant had attempted to show that he had not been served, or if the respondent had thereafter failed to supplement its proof by showing that the party who made the service was qualified, there might be some merit in appellant's contentions.

The record before us shows that the trial court had jurisdiction, and the judgment is therefore affirmed.

HADLEY, C. J., MOUNT, and FULLERTON, JJ., concur.

Feb. 1908]

Opinion Per CROW, J.

[No. 6858. Decided February 21, 1908.]

W. P. FULLER & COMPANY, *Respondent*, v. EMMET HARRIS  
*et al.*, *Appellants*.<sup>1</sup>

**SALES—ACTION FOR PRICE—EVIDENCE—ADMISSIBILITY—QUALITY OF GOODS.** Where, upon a claim of a breach of a warranty of shellac sold for finishing furniture, defendants in an action for the price had introduced evidence tending to show that it was adulterated and worthless and that it flaked and chipped off after it had been treated with a glue preparation, it is competent for the plaintiff to show in rebuttal that, at defendant's request, a witness had sold an inferior quantity of glue to them, which if used on the furniture would have produced the effects ascribed by the defendant to the quality of the shellac, there being direct evidence that the shellac was of good quality.

**SAME—TRIAL—INSTRUCTIONS—ERRORS CURED—BREACH OF WARRANTY—DELAY IN MAKING CLAIM.** It is not prejudicial error to instruct that delay for a long time in asserting a claim for damages for breach of warranty for shellac sold is a circumstance against the good faith of the claim, where a further instruction was given to the effect that the party was under no obligation to return the property on discovery of the breach but could retain the same and recover his damages, in the absence of any request for any other instructions on the subject or any explanation of the instruction complained of.

Appeal from a judgment of the superior court for King county, Tallman, J., entered January 5, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

*Charles P. Harris* and *Bamford A. Robb*, for appellants.

*Gray & Stern (Jas. A. Snoddy*, of counsel), for respondent.

Crow, J.—This action was brought by W. P. Fuller & Company, a corporation, to recover \$240.98 from the defendants, Emmet Harris and T. P. Keeney, copartners as Harris-

<sup>1</sup>Reported in 93 Pac. 1080.

Keeney Company, for certain goods sold and delivered, including one barrel of powdered white shellac, of the alleged value of \$180.08. The defendants admitted the purchase, but for an affirmative defense alleged that the shellac was impure, adulterated, and worthless; that it was purchased by them with plaintiff's knowledge that it was intended for use in finishing furniture; that plaintiff warranted it as fit for such use; that defendants could obtain no other shellac at Hong-kong, China, where their furniture factory was located; that before they discovered the worthlessness of the shellac they had used about one-half of it in finishing large quantities of furniture which appeared to be in good and merchantable condition when finished; that after the furniture had been shipped to defendants' customers, the shellac finish flaked and fell off; that their customers refused to receive the consignments, and that the defendants were thereby damaged in the total sum of \$3,000, for which they asked judgment.

The only issue was as to the quality of the shellac, and the alleged damages. It appears from undisputed evidence that no claim for damages was presented to the plaintiff until the answer was served herein. The goods were sold August 9, 1904. This action was commenced November 28, 1905, and the defendants answered on February 26, 1906. The original agreed purchase price for the goods sold was \$251.58, but the plaintiff alleged that the defendants became entitled to an allowance of \$10.60 on account, which was made on January 25, 1905. The undisputed evidence shows that this allowance was made at the time alleged, in settlement of some claim for a reduction presented by the defendants, but that no damages were then mentioned. The plaintiff offered evidence tending to show that, when the \$10.60 credit was allowed, the defendants asked for an extension of time on the remainder of the account, which was granted. On a jury trial a verdict was rendered in favor of the plaintiff. From the judgment entered thereon this appeal has been taken.

Feb. 1908]

Opinion Per CROW, J.

The appellants, in presenting their defense, offered evidence showing that it was their custom, before applying the shellac finish, to treat the furniture with a preparation made with glue. They also introduced the depositions of their customers to whom furniture had been shipped, showing the inferior quality of finish. There is much doubt whether any of this evidence indicated that the defective finish resulted from the use of inferior or adulterated shellac. After this evidence had been admitted, the respondent introduced a witness, who, over appellants' objection, was permitted to testify that he had, at appellants' request, sold for respondent and delivered to them an inferior quality of glue which, if used in preparing the furniture for finish, would produce the conditions to which appellants' customers had testified. The trial court afterwards denied appellants' motion to strike this evidence, and refused to instruct the jury to disregard the same. Appellants now claim that prejudicial error was thereby committed. Appellants introduced no direct evidence showing that the shellac shipped by respondent was of an inferior or worthless quality. In fact, they excuse themselves for using it in finishing a large amount of furniture by claiming they did not then know it to be worthless, but supposed it to be as warranted. The principal facts upon which they now predicate their claim that it was worthless are that they used it in finishing, and that the finish afterwards flaked and fell off. Respondent's witnesses positively testified that a sample of the shellac taken from the barrel immediately before shipment had been examined and found to be first class in every respect. Under the issues and these circumstances we fail to understand how any prejudicial error was committed by permitting respondent to show the sale of the inferior glue shipped to appellants at their request, as it tended to show that appellants had an opportunity to use it in preparing the furniture, and it was contended that such use was improper. There was no witness corroborating the evidence of

one of the appellants, who was the only person testifying to the method of using the glue and shellac in finishing. His credibility was for the jury, and in passing thereon and in weighing his evidence, it was proper for the jury to know and understand all the attendant circumstances.

The appellants further contend that the court erred in instructing the jury as follows:

"The jury are instructed that if they believe from the evidence that the defendants delayed asserting any claim against the plaintiffs until after the plaintiffs had commenced suit, and that defendants had knowledge of the defect in the shellac for a long time prior, then you may regard defendants' failure to assert such claim as a circumstance against the good faith of defendants' claim."

This instruction as worded is perhaps not entitled to an unqualified approval. There is no doubt but that an unreasonable delay in presenting appellants' claim for damages, when as here contended they had obtained an item of credit and asked further time for payment, should be considered by the jury in passing upon their good faith or lack of good faith. The language used by the court, in the absence of any further instructions, might have possibly misled the jury into understanding that such unexplained delay amounted to a waiver of appellants' right to recover damages; and the question now before us is whether the instruction, in view of the entire record, constituted prejudicial error. In *Elliott v. Puget Sound etc. S. S. Co.*, 22 Wash. 220, 60 Pac. 410, cited by the appellants, it was in substance held that a vendee's failure to make a claim for damages on account of the defective condition of goods sold, until after the dates of all items of the account, and after payments had been made thereon, was not such a showing of lack of good faith as to necessarily deprive the vendee of his right to afterwards plead, prove, and recover damages in an action for the purchase price.

"If a warranty has been proved, keeping the goods, delay-

Feb. 1908]

Opinion Per CROW, J.

ing to give notice of the defect, etc., may furnish a strong presumption against an alleged breach of warranty; but cannot bar the buyer from suing for, or recouping his damages for such breach, if proved." Abbott, Trial Evidence (2d ed.), Ch. XVI, page 431, § 84.

The instruction above set forth does not in this case go to the extent of advising the jury that appellants would by such delay necessarily deprive themselves of the right to claim damages. It is not shown that they requested any instruction on this subject, or that they asked the court to modify or explain the instruction given. The evidence that such delay did occur, and that the damages were first claimed in the answer, was undisputed. Yet the court further instructed as follows:

"The purchaser of an article purchased under a warranty is under no obligation to return the same on discovery of breach of a warranty, but may affirm the contract, retain the goods, and recover his damages, arising from the breach of warranty in an action brought by the seller for the purchase price, if any such damages he has sustained."

On this record we fail to see how the jury could have been misled, or that any prejudicial error was committed. The judgment is affirmed.

HADLEY, C. J., MOUNT, FULLERTON, and ROOT, JJ., concur.

[No. 6951. Decided February 24, 1908.]

ALEXANDER McCLELLAN, *Appellant*, v. JOHN GERRICK *et al.*,  
*Respondents*.<sup>1</sup>

NEGLIGENCE—DANGEROUS PREMISES—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. An inspector of a steel building in course of construction assumed the risks and is guilty of contributory negligence precluding any recovery from a subcontractor who gave an assurance of safety, where it appears that it was part of his duty to carefully examine every piece of material, and see that it was properly riveted, and that, relying on the contractor's statement that all pieces were riveted, he undertook to cross a high beam and was injured by reason of its not being riveted, it appearing that the defect was obvious to casual inspection, and one which it was his duty to detect, and which he testified he would have seen if he had looked.

Appeal from a judgment of the superior court for King county, Frater, J., entered June 27, 1907, upon granting a nonsuit, in an action for personal injuries sustained by an inspector of a building in course of construction. Affirmed.

*Walter S. Fulton*, for appellant.

*Kerr & McCord*, for respondents.

MOUNT, J.—This appeal is from a judgment of nonsuit in an action for personal injuries. At the time of appellant's injuries, Herman Chapin was erecting a large building in the city of Seattle. Matthew Dow had the contract for the work. The respondents Gerrick & Gerrick were subcontractors, having to erect the steel construction work of the building, the material therefor being furnished by the owner ready to put in place. The appellant was in the employ of the owner and the principal contractor. His duties were to inspect the work of Gerrick & Gerrick, to see that all of the material was properly placed and securely riveted and the structure plumb, and that the work when completed was in accordance with the

<sup>1</sup>Reported in 93 Pac. 1087.

Feb. 1908]

Opinion Per MOUNT, J.

plans and specifications. On August 14, 1906, appellant noticed that the gang of riveters employed by Gerrick & Gerrick had been sent away, and on inquiry was informed by John Gerrick, one of the respondents, that the reason therefor was that all of the steel work was in place, and that the riveting was all finished excepting a portion under the derrick, and that the work was in condition to be inspected. Two days later the appellant went upon the building for the purpose of making an inspection. When going from one part to another he attempted to walk across an "I" beam, six inches deep, about three and one-half inches wide on top and about twelve feet long. This beam was not riveted. A temporary bolt was in one end and the other end lay loose upon a lug. It was not fastened either by bolt or rivet. When appellant walked to about the center of the beam, it dropped down at the unfastened end and let the appellant fall a distance of about thirty-five feet. He was severely injured. The respondents Gerrick & Gerrick knew of the condition of this beam, but did not inform the appellant thereof. The appellant's evidence shows, that it was the duty of respondents Gerrick & Gerrick, immediately after the work was riveted, to paint the steel work, and this beam was not painted; that appellant's first duty upon inspection was to plumb the work, and to do this it was necessary for him to cross over from one part of the structure to another on these "I" beams; that he relied upon the statement of respondents that the work was completed, and did not notice the condition of this particular beam before he went upon it. Upon substantially these facts, the trial court granted the defendants' motion for a nonsuit. The action was thereupon dismissed. Matthew Dow and Herman Chapin, who were originally made parties defendant, were dismissed upon motion of the plaintiff before the trial began.

It is contended by the respondents that the appellant was not in their employ, and that therefore they owed him no duty.

We shall not pass upon this question, because we are clearly of the opinion that the appellant assumed the risk, and was also guilty of contributory negligence even though respondents Gerrick & Gerrick had employed him. The appellant himself testified, that he was employed as an inspector of the building; that it was his duty to carefully and critically examine every part of the work, and to see that every piece of material was in place and properly riveted; that this was his sole duty, and that he was constantly on the building for that purpose. It was, therefore, his duty to discover this defect which caused his injury. He was employed and was there for that purpose. The defect was not a hidden one. It was obvious and apparent to a casual inspection. Upon this subject he testified:

"The heads of the rivets were one inch wide. . . . If I had stopped and looked down I could have seen whether there were any rivets or not. . . . I was looking for rivets. . . . If I had looked I would have seen the work was not complete and would then have examined it carefully."

This conclusively shows that, if the appellant had used ordinary diligence, he would have avoided the injury. He seeks to excuse his neglect by saying, that he was required to plumb the work before he examined for defects in riveting; that he had been notified that the work was completed except a certain specified portion. Assuming these facts to be true, they do not excuse the carelessness of appellant, because ordinary prudence dictates that, before a man should attempt to walk across a beam three and one-half inches wide—no wider than his shoe sole—twelve feet long, and which was thirty-five feet from the ground, he should at least look and see that the beam is fastened in place. He could have seen the beam was insecure by simply looking. This he failed to do. His failure to use his senses was, therefore, the proximate cause of his injury. When, in addition to this, it is conceded that he was employed to inspect and discover defects of this kind, it is plainly evident that respondents are not liable.

Feb. 1908]

Opinion Per MOUNT, J.

The trial court therefore properly granted the motion, and the judgment must be affirmed.

HADLEY, C. J., CROW, FULLERTON, and ROOT, JJ., concur.

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[No. 6978. Decided February 24, 1908.]

M. W. HAPÉMAN *et al.*, *Appellants*, v. THOMAS D. MCNEAL  
*et al.*, *Respondents*.<sup>1</sup>

REFORMATION OF INSTRUMENTS — MISTAKE IN DEED — EVIDENCE. Reformation of a deed upon the ground of a mistake in the description, which is denied by the opposite party, will not be granted where the evidence is not clear and convincing or the mistake is not established beyond a reasonable doubt.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered May 21, 1907, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action to reform a deed. Affirmed.

*Million, Houser & Shrauger*, for appellants.

*Smith & Brawley*, for respondents.

MOUNT, J.—This action was brought by the appellants to reform a description in a deed for a tract of land owned by appellants in the town of Mount Vernon. After issues were made up, a trial was had, and the court found that there was no mistake in the deed, and dismissed the action. The plaintiffs appeal.

The tract of land in question is about midway between Myrtle street to the north and Kincaid street to the south. It fronts on Second street on the west. Kincaid street runs east and west. Second street runs northward twenty degrees east. Myrtle street extends eastward from Second street seventy

<sup>1</sup>Reported in 93 Pac. 1076.

degrees south. So that Kincaid and Myrtle streets are not parallel with each other, but converge toward the east. The line on the north of the parcel of land in question is concededly parallel with Kincaid street. It runs east and west. The line on the south is the one in dispute. The deed describes this line as parallel with Kincaid street, while appellant M. W. Hapeman contends that it was his intention, and the intention of the grantor, that this line should be parallel with Myrtle street so that his lot, instead of being fifty feet wide at each end, should be fifty feet wide in front and seventy-three feet wide in the rear or east end.

There is some evidence to the effect that a fence was built upon the south line of the lot by the grantor soon after the deed was executed, and that this fence, if on the line intended, places the south line of appellant's lot as contended for by him. But the evidence also shows that, at about the time the deed was drawn, the appellant and his grantor and two other persons, for the purpose of describing the lot, measured the front line of the lot on Second street fifty feet; that they also measured the north line and the east line; that the line on the east, which line runs due north and south, was measured the same length as the west line, viz., fifty feet. This shows, of course, that the lot was a strip of land fifty feet in width, and that the lines on the north and south were intended to be parallel as they are described in the deed. It is true that the south line as described in the deed runs through one corner of the building located upon the lot, and the grantor testified that he intended to sell to the appellant sufficient land to clear the building, and, if the land described in the deed does not do so, that there was a mistake. But this mistake, of course, was not in the description of the land actually sold and conveyed by the deed, but was a mistake in the quantity of land sold and purchased. From a consideration of all the evidence in the case we are not free from doubt that the deed incorrectly describes the lines intended at the time of its execution.

Feb. 1908]

Syllabus.

"The authorities all require that the parol evidence of the mistake and of the alleged modification must be clear and convincing,—in the language of some judges, 'the strongest possible,'—or else the mistake must be admitted by the opposite party; the resulting proof must be established beyond a reasonable doubt. Courts of equity do not grant the high remedy of reformation upon a probability, nor even upon a *mere* preponderance of evidence, but only upon a certainty of the error." 2 Pomeroy, Equity Jurisprudence (3d ed.), § 859.

The evidence is not, in our opinion, sufficient to warrant a reversal of the case. The judgment must therefore be affirmed.

HADLEY, C. J., CROW, FULLERTON, and ROOT, JJ., concur.

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[No. 6813. Decided February 25, 1908.]

NORTH COAST RAILWAY, *Petitioner*, v. NORTHERN PACIFIC  
RAILWAY COMPANY *et al.*, *Claimants*.<sup>1</sup>

EMINENT DOMAIN—PROPERTY DEVOTED TO PUBLIC USE—NECESSITY. A Congressional grant of a railroad right of way of a certain width is not conclusive of the fact that the entire width was necessary for the purposes of the railroad, as against another railroad seeking to condemn a portion thereof for public purposes.

SAME. The right of eminent domain under state laws may be exercised by a railroad company to condemn a longitudinal portion of a right of way granted by Congress to another railroad company, if public necessity therefor exists and the occupying railroad does not require the portion taken.

SAME—COMPENSATION—RAILROADS—GRANTS. A railroad company seeking to condemn a portion of the right of way of another railroad through a mountain pass, seeking to acquire a tract outside of the roadbed of the other company, is not relieved from paying compensation by virtue of U. S. Stat. at Large, ch. 152, p. 482, § 2, providing for common usage and occupancy by railroad companies of roadbeds through a canyon, pass, or defile, since no common usage is sought.

<sup>1</sup>Reported in 94 Pac. 112.

**SAME—WAIVER OF OBJECTION TO DAMAGES.** Where a petitioner in condemnation proceedings asks that the damages be ascertained, it cannot contend, upon review by certiorari, that no damages can be awarded by reason of petitioner's right of common usage.

**SAME—NECESSITY FOR TAKING RAILROAD RIGHT OF WAY—EVIDENCE—SUFFICIENCY.** A reasonable public necessity, authorizing the condemnation of a longitudinal portion of a railroad right of way through a mountain pass for three-fifths of a mile, appears where the same is wanted for a railroad right of way through the pass, there being no other way except by the construction of a tunnel, costing \$200,000, or by crossing a swift mountain stream twice and using unsafe substructure through low lands swept by floods, involving a much greater expenditure of money than the other route and increased dangers to the public.

**SAME.** A finding that double tracks of a transcontinental railroad through a mountain pass, where but one track has been used, will answer the necessity of future needs, is justified by evidence that the company is constructing another line of railway for the purpose of relieving the present single track of through traffic.

**SAME—ORDER OF CONDEMNATION—MODIFICATION.** Upon condemnation of a longitudinal portion of a railroad right of way through a mountain pass, an order of condemnation of a strip commencing twenty-five feet from the center of the present track in case the grade thereof is not raised within one year, and commencing forty-five feet from the center of the track if the grade is raised, will be modified, on certiorari, making it forty-five feet unconditionally, where it appears that the same will answer all the purposes of the petitioner.

**SAME.** An order condemning a railroad right affecting a highway, requiring the petitioner to relocate and remove the highway within a limited time, will be modified, on certiorari, where there appears no necessity for such time limit.

Certiorari to review a judgment of the superior court for Yakima county, Rigg, J., entered May 13, 1907, upon findings in favor of the petitioner, after a trial on the merits before the court without a jury, adjudging a public use and ordering an assessment of damages in a condemnation proceeding. Affirmed.

*H. J. Snively and Danson & Williams (Fred H. Moore, of counsel), for petitioner.*

*B. S. Grosscup and Ira P. Englehart, for claimants.*

Feb. 1908]

Opinion Per HADLEY, C. J.

HADLEY, C. J.—This proceeding was instituted by the North Coast Railway as petitioner against the Northern Pacific Railway Company and others as claimants, for the purpose of condemning a right of way for the petitioning corporation. The land which the petitioner seeks to condemn lies within the right of way of the claimant Northern Pacific Railway Company, in Yakima county. The claimant company's title to its right of way in general was acquired from the United States through an act of Congress passed in 1864, which granted to claimant's predecessor in interest, Northern Pacific Railroad Company, two hundred feet in width on each side of its railroad where it should pass through the public lands.

Prior to the passage of the act granting to claimant's predecessor the right of way as aforesaid, and in the year 1859, the United States entered into a treaty with the Yakima Indians, whereby certain lands were reserved to the Indians, the territory covered thereby being commonly known as the Yakima Indian reservation. That portion of the right of way here in question lies within said reservation, and was not a part of the public lands, within the meaning of the said act of Congress, which the United States could then absolutely grant. The reservation thereof to the Indians, therefore, remained in force until the year 1885, when their rights therein, to the extent of a strip of two hundred and fifty feet in width, were extinguished by their agreement with the United States and by their release of a strip of land extending one hundred and twenty-five feet "on each side of the line laid down on the map of definite location of the route of the Northern Pacific railroad wherever said line runs through said reservation." For the above reasons the right of way of claimant at the point in question is two hundred and fifty feet in width, whereas the usual width under the original grant was four hundred feet. At the place in question the claimant's right of way extends in a northerly and southerly direction follow-

ing the westerly shore of the Yakima river. The claimant's present track lies a short distance from the west bank of said river, and its right of way extends still further to the west, a distance of one hundred and twenty-five feet from the center line of its present track. It is a part of the last-named one hundred and twenty-five feet that the petitioner seeks to condemn. The strip sought by petitioner extends longitudinally on the west of claimant's track an entire distance of three thousand nine hundred and sixty-five feet from north to south over claimant's right of way, and it is of irregular width. It extends between the spurs of the Ahtanum and Rattlesnake mountains, and the place is known as "Union Gap."

The petition alleges, that the petitioner is a corporation duly organized under the laws of this state to construct, maintain, and operate railways within the state, and that it is now engaged in the construction of a line of railway from Kiona, in Benton county, to the city of North Yakima, in Yakima county; that owing to the topography of the country the petitioner cannot reasonably locate its railroad without going over the right of way of the claimant railway company, or incurring ruinous expense; that said Union Gap is a narrow defile with an abrupt mountain rising from the Yakima river on the west; that at the foot of the mountain and within a few feet of the river, the claimant railway company has constructed and is operating its line; that the mountain rises abruptly several hundred feet in height, and that in order to construct petitioner's road through said gap, the strip of land sought becomes necessary. The claimant railway company answered the petition by denials and by affirmative allegations, to the effect that the petitioner is not entitled to condemn any part of said right of way. A preliminary trial was had before the court to determine the question of public use and necessity, and that question was determined in favor of the petitioner. This is a proceeding in this court by writ of review to review the judgment of the trial court. Each

Feb. 1908]

Opinion Per HADLEY, C. J.

of the railway companies seeks to review certain features of the judgment as will hereinafter appear.

The claimant first contends that no part of the right of way granted to its predecessor, and which has passed to the claimant company, is subject to appropriation by any other railroad company. This contention is based upon the theory that the act of Congress which granted a right of way four hundred feet in width was in itself a conclusive determination that the entire amount granted was necessary for the public purposes of the grant, and that it is not a question for the courts to determine whether the whole of it is actually needed or not. The same argument is applied to the tract in question, the Indian title to which did not pass until the aforesaid treaty, which was long after the grant by the railway act of 1864, but which treaty was afterwards ratified by Congress, including the reduced width of the right of way. Upon this point claimant cites *Northern Pac. R. Co. v. Townsend*, 190 U. S. 267, 23 Sup. Ct. 671, 47 L. Ed. 1044. Emphasis is placed by claimant upon the following language used in the opinion in the above case:

"Nor can it be rightfully contended that the portion of the right of way appropriated was not necessary for the execution of the powers conferred by Congress, for, as said in *Northern Pacific Railroad Co. v. Smith*, 171 U. S. 261, 275, speaking of the very grant under consideration: 'By granting a right of way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance.' Neither courts nor juries, therefore, nor the general public, may be permitted to conjecture that a portion of such right of way is no longer needed for the use of the railroad and title to it has vested in whomsoever chooses to occupy the same. The whole of the granted right of way must be presumed to be necessary for the purposes of the railroad, as against a claim by an individual of an exclusive right of possession for private purposes."

It will be observed from the language quoted that the court had under consideration a question of title claimed through

adverse possession by an individual for private purposes, and it was stated in unmistakable language that in such a case the courts cannot say that the full amount of the original grant is no longer needed. Such a case, involving only individual and private considerations, is very different from one which involves public necessities. In order that it might be clearly understood that the court recognized such a necessary distinction, the following language was used in the same opinion:

"Of course, nothing that has been said in anywise imports that a right of way granted through the public domain within a state is not amenable to the police power of the state. Congress must have assumed when making this grant, for instance, that in the natural order of events, as settlements were made along the line of the railroad, crossings of the right of way would become necessary, and that other limitations in favor of the general public upon an exclusive right of occupancy by the railroad of its right of way might be justly imposed. But such limitations are in no sense analogous to claim of adverse ownership for private use."

It seems clear from the quotation last made that the Federal supreme court recognizes the power of the state to determine whether the whole of a right of way which has been created by Federal grant through an act of Congress is actually needed as against the requirements of the public service which arise with the increase of commerce and transportation necessities. It has been repeatedly held by this court that the power exists in this state, when public necessity requires it, for one railway or public service corporation to condemn a part of the right of way of another railway company or public service corporation which is not necessary for the exercise of the latter's franchise. *Seattle & Montana R. Co. v. Bellingham Bay & Eastern R. Co.*, 29 Wash. 491, 69 Pac. 1107; *State ex rel. Spokane Falls & N. R. Co. v. Superior Court*, 40 Wash. 389, 82 Pac. 417; *State ex rel. Columbia Valley R. Co. v. Superior Court*, 45 Wash. 316, 88 Pac. 332; *State ex rel. Kent Lumber Co. v. Superior Court*, 46 Wash. 516, 90

Feb. 1908]

Opinion Per HADLEY, C. J.

Pac. 663; *State ex rel. Skamania Boom Co. v. Superior Court*, 47 Wash. 166, 91 Pac. 637. It has also been repeatedly held by other courts that a right of way of a railroad company, which has been acquired for that express purpose through a Federal grant, is not exempt from the operation of state laws of eminent domain. *Northern Pac. R. Co. v. St. Paul etc. R. Co.*, 1 McCrary 302; *Union Pac. R. Co. v. Burlington etc. R. Co.*, 1 McCrary 452; *Union Pac. R. Co. v. Leavenworth etc. R. Co.*, 29 Fed. 728; *Illinois Cent. R. Co. v. Chicago etc. R. Co.*, 26 Fed. 477.

It is true the most, if not all, of the last-cited cases related to crossings of other railways over a right of way acquired by Federal grant, whereas the tract here sought is not for mere crossing purposes but is a longitudinal tract about three-fifths of a mile in length, to be carved out of claimant's right of way. The principle as to the power of eminent domain is, however, the same in both cases, depending upon the necessities of the occupying railway and those of the public service. This court has held that a longitudinal portion of a right of way may be condemned by another railway corporation where the occupying railway does not actually need it, and where it is needed by the other in the interest of the public service. *Seattle & Montana R. Co. v. Bellingham Bay & Eastern R. Co.*, *supra*. It is, therefore, held here that the petitioner may invoke the power of eminent domain to acquire a longitudinal part of claimant's right of way if the showing as to the necessities of the two companies in the interest of the public service is sufficient to warrant it.

The petitioner argues that the place where it seeks to condemn is within a canyon, pass, or defile within the meaning of the act of Congress of 1875. Stat. at Large, ch. 152, p. 482. Section 2 of said act provides that a railroad company whose roadbed passes through a canyon, pass, or defile "shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile, for the pur-

poses of its road in common with the road first located or the crossing of other railroads at grade." It will be seen that the statute seems to contemplate a common occupancy by two or more railroads of a situation otherwise impossible to be utilized by more than one in passing from one section of the country to another. In its petition the petitioner does not seek to occupy a common roadbed with the claimant, and admits that the situation does not make such an occupancy necessary when it seeks a tract entirely distinct from claimant's roadbed. The evidence, and the court's findings also, show that such common occupancy is unnecessary. It is true the contracted situation and peculiar topography give rise to the necessity for acquiring a part of claimant's right of way at this particular place, if that necessity shall be found to exist. Otherwise the petitioner could pass without the limits of claimant's right of way. It does not follow, however, that the situation is that of a canyon, pass, or defile where the petitioner, by reason of extreme necessities and engineering difficulties, might have the right to force a common use and occupancy of the same ground. With this view it is unnecessary to examine the question discussed in the briefs as to whether the act of 1875, being subsequent to that granting the right of way, applies here.

At this point it is well to notice the contention of the petitioner, made in its brief, that it should not be required to pay the claimant any compensation for the appropriation which it seeks, if the appropriation shall be allowed. This contention is based upon the theory that the canyon act of 1875 applies to this situation, and that the absolute right to a common occupancy exists by reason thereof. From what was said in the last paragraph above it will be seen that the petitioner's contention in this respect cannot be sustained. If appropriation is made, the case belongs to the ordinary class of cases where mere topographical necessities make the appropriation of a part of the right of way necessary, but not

Feb. 1908]

Opinion Per HADLEY, C. J.

without the payment of compensation to the extent of the damages. Moreover, the petitioner in its petition prayed that the damages shall be ascertained, and the court adjudged that claimant is entitled to compensation for any damages it may sustain in the premises. So that in any event we think the petitioner is not in a position to ask a review of the court's order in the particular mentioned.

The claimant contends that a sufficient showing of necessity has not been made to authorize the condemnation of any part of its right of way. The record of the evidence is very extensive, and it is as impracticable as it is unnecessary to discuss the evidence in detail. It appears, however, that the Yakima river rises in the Cascade mountains and flows south and east, entering the Yakima valley on the north through Selah gap, and passing out at the south through Union gap. Ahtanum creek, flowing from the northwest, empties into the river just above Union gap, and through this gap pours the accumulated drainage of these two streams. The gap itself, as heretofore stated, is formed by the converging spurs of two ranges of mountains, and on the west side at the place in controversy, the mountain rapidly ascends from the bench occupied by claimant's track near the river bank. It is contended that petitioner can construct its line on the east side of the river. To do so, however, involves crossing and bridging the river twice, if the road shall first pass through the Yakima reservation on the south and then reach the city of North Yakima on the north, as is desired in order to carry out the purpose of serving the public. Furthermore, construction on the east side would not only involve a very much greater expenditure of money, but in addition to the hazards from two bridges crossing a swift mountain stream, the line would necessarily run over low-lying lands which are much flooded with water and in times of high water are swept with currents that would make the necessary substructure unsafe and the operation of trains thereon dangerous. It is also contended that,

even if petitioner constructs its line on the west side, it can do so without taking any part of claimant's right of way. To do so would require the construction of a tunnel, and the additional expense would approach \$200,000. In addition to the difference in cost of construction, we must consider the perpetual expense of maintaining the tunnel and operating trains therein, together with the attendant dangers to the traveling and shipping public. It is true it is not shown to be impossible to construct and operate a line either on the east side or outside of claimant's right of way on the west side, if a sufficient amount of money is expended and the increased dangers are not considered. It does appear, however, that it is not reasonably practicable to adopt either of the routes proposed by claimant when all the surroundings are considered. Claimant contends that the necessity for the appropriation must be absolute, and argues that this court has so decided in *State ex rel. Portland & Seattle R. Co. v. Superior Court*, 45 Wash. 270, 88 Pac. 201. Reference is made to certain words contained in a quotation which we made in that opinion from *Sharon R. Co. v. Sharpsville R. Co.*, 122 Pa. St. 533, 17 Atl. 234. The quotation was merely used argumentatively, and we think it must be clear from our own language that we intended to hold that a reasonable public necessity is all that is required to authorize the condemnation of property already devoted to a public use. In any event there can be no mistake that we did so hold in the later case of *State ex rel. Skamania Boom Co. v. Superior Court*, *supra*. Within such rule we think the facts appearing in this case are sufficient to support condemnation.

The court did not find that the petitioner is entitled to condemn the tract as described in the petition, but found that it should be awarded a strip farther removed from claimant's roadbed, so that claimant may have ample room to construct another track. It was found that a double track line at this place will answer all the present and future necessities of

Feb. 1908]

Opinion Per HADLEY, C. J.

claimant. Claimant contends that this finding was without evidence upon which to base it. We think, however, that the finding was justified under the evidence of Mr. Levey, one of the vice-presidents of the claimant company, who testified that his company is now constructing a line down the north bank of the Columbia river for the purpose of avoiding the mountain grades in the carriage of through traffic. This new line will relieve the present single track line of much of the traffic it now carries, and if another track shall hereafter be constructed through Union gap, it certainly fairly appears that it will reasonably answer all of claimant's future necessities at that place.

In order to leave claimant room for an additional track to the west of its present track, the court established petitioner's line further up the mountain side. It was shown that claimant contemplates raising its grade at this place from about ten to fourteen feet, conforming to a general system of changing its grades in the locality. The court provided that the easterly boundary of petitioner's location shall be forty-five feet to the west of the center line of claimant's present track, provided that claimant shall raise its grade as aforesaid within one year after the petitioner shall remove the public highway from that place. Otherwise the easterly boundary of petitioner's location shall be twenty-five feet to the west of the center line of claimant's present track. It appears that, by agreement between the petitioner and Yakima county, the petitioner is to take care of the highway and relocate and reconstruct it so that neither railroad will interfere with it. The court further provided that the petitioner shall remove this highway within six months from the final adjudication of this action or suffer a dismissal. Both parties seek modifications of the order of the court. We think it should be modified. It was found that the petitioner can reasonably locate and operate its line within territory forty-five feet to the west of claimant's track, and that the said forty-five feet is necessary

for claimant's future use. These findings are attacked by the petitioner, but we think they are sustained by the record, and shall not disturb them. We see no reason for the variation of the width of the strip reserved to claimant by a difference of twenty feet, apparently as a mere penalty to claimant if it shall not raise its grade within a year. As the first occupant, with full rights there, it is claimant's own affair whether it shall raise its grade or not, and there seems to be no reason why it shall be penalized if it shall not do so. We therefore think the order should be modified so as to establish petitioner's location absolutely to the west of a line forty-five feet to the west of the center of claimant's present track, and that no time limit shall be fixed with reference to when claimant shall raise its grade.

With regard to petitioner's construction before claimant's grade may be raised, it is sufficient to say that the profile of claimant's grade revision was submitted at the hearing of this case, for the accuracy of which claimant must be bound and responsible under such circumstances and assurances. The petitioner can proceed with its own construction, having reference to that profile if it becomes necessary to have regard to claimant's future grade. We also think the provision with reference to petitioner's removing the highway should be modified. The purpose of requiring the early removal seems to have been to prevent the highway from interfering with the raising of claimant's grade, but inasmuch as claimant objects to a time limit for doing that work, there seems to be no good reason for requiring petitioner to so soon remove the road, unless the necessity therefor shall arise. We therefore think the order should be modified to the effect that petitioner shall remove the highway within six months after it shall receive written notice from the claimant company to do so, the petitioner, however, having the privilege to remove it sooner if it shall voluntarily choose to do so.

The case is remanded with instructions to modify the order

Feb. 1908]

Opinion Per Root, J.

in the particulars above indicated, and in all other respects the judgment is affirmed. Neither party shall recover its costs on this review.

CROW, RUDKIN, DUNBAR, and ROOT, JJ., concur.

FULLERTON and MOUNT, JJ., took no part.

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[No. 6939. Decided February 26, 1908.]

GUY WARING, *Appellant*, v. J. A. LOOMIS *et al.*,  
*Respondents*.<sup>1</sup>

CONTRACTS—VALIDITY—PUBLIC POLICY—PUBLIC LANDS—ACQUISITION. A contract whereby one of the joint occupants of public lands was given sole possession and agreed to acquire title from the government, acknowledging a trust in favor of the other for a one-half interest in the land after acquisition of title, will not be held to be void as contemplating the unlawful acquisition of the land under the homestead laws by fraud and perjury, where the title could be and subsequently was lawfully acquired under the mineral laws, and there was no clear and convincing evidence that a criminal act was intended in entering into the contract.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered December 8, 1906, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action to quiet title. Reversed.

*Graves, Kizer & Graves*, for appellant.

*Merritt, Oswald & Merritt*, for respondents.

ROOT, J.—Plaintiff brought this action to establish ownership to an undivided one-half interest in certain realty in Okanogan county. From a judgment dismissing the action, he appeals.

<sup>1</sup>Reported in 93 Pac. 1088.

In 1888, plaintiff, while in possession of the premises as unsurveyed government land, sold to one J. A. Loomis (since deceased) an undivided one-half interest in and to the improvements upon and rights in the land, and at the same time entered into a copartnership with said Loomis for the purpose of carrying on a general merchandise business. Subsequently the partnership was dissolved, and appellant removed from the land, leaving Loomis in possession under the contract herein-after set forth. In 1891, Loomis located the land as quartz claims under the United States mineral land laws. In 1896, patents for such land were taken in the name of one Bogart, a brother-in-law of Loomis, he knowing of the contract between appellant and Loomis, and taking the patents as a convenience to the latter. Subsequently the lands were conveyed to respondent Calhoun, who took title with notice of appellant's rights. Appellant and Loomis, knowing or believing that any agreement between them as to the conveyance by one to the other of an interest in land held and to be acquired as a homestead by one of them would be illegal, consulted an attorney as to what they could do in order to make an equitable division of the property, or adjust matters so that Loomis could keep the property and appellant get the value of his equitable interest therein. Upon the advice of the attorney, appellant and Loomis entered into the following agreement, to wit:

"Be it known by these presents, that we, J. A. Loomis, of Sinlahekin Ranch, near Sinlahekin Creek, in the county of Okanogan and territory of Washington, party of the first part, and Guy Waring, late of the same place, party of the second part, being the undivided one-half owners of one hundred and sixty acres of land (subject to the paramount title of the United States), located upon Sinlahekin Creek in said county of Okanogan, and known as the Sinlahekin Ranch, together with the improvements thereon, and having heretofore been in the joint occupancy thereof, and the said Waring being about to remove therefrom and to leave said Loomis in the sole use, occupation and possession of the same, have

Feb. 1908]

Opinion Per Root, J.

agreed and concluded concerning said land and ranch and improvements thereon as follows, viz: (1) Loomis is to pay Waring in cash money upon the signing of this agreement the sum of two hundred and fourteen (\$214.00) dollars, as his part of the expense of erecting the dwelling house lately occupied by said Waring and his family on said ranch. (2) Loomis is to have the sole use, occupation, and possession of said land, ranch and improvements thereon, upon the following terms, viz: (a) He shall keep all boundary posts in position and in every lawful manner protect the exclusive possession thereof, and prevent said land from being jumped as unoccupied lands of the United States, and when the same are in market will apply for and obtain patent thereto if he can. (b) Loomis is to pay to Waring one-fifth in quantity and quality of hay raised on the ranch each year, delivered on said ranch, and shall have the privilege of buying the same from Waring for cash at any time before the end of the year in which the same was grown at the current price for hay of similar class and quality on December 1st, of such year, and in any event, said Loomis shall take said one-fifth of the hay at the end of the year in which it is grown, and pay Waring therefor in cash money the current price of hay of similar class and quality in that vicinity at the end of such year in which the same is grown. (c) Loomis is hereby authorized at any time to make a *bona fide* sale of said ranch or any part thereof for the mutual and equal benefit of both parties hereto, and to execute in Waring's name any and all necessary conveyances thereof, and pay the proceeds of such sale, one-half to himself and one-half, less 5 per cent. commission, to Waring forthwith, provided, that if Waring furnishes a purchaser for said ranch, Loomis shall not be entitled to retain any percentage as commission, but in all other respects this paragraph remains the same. (d) Loomis shall have no right to sublet or lease said land or any part thereof to any third person. (e) Loomis hereby acknowledges a trust in favor of said Waring for an undivided one-half interest in the whole of said land, and in the event of his obtaining the paramount title of the United States to said land in his own name he hereby acknowledges an express trust to the extent of one undivided one-half thereof in favor of Guy Waring for the faithful administration of which said express trust he hereby binds his

heirs, executors and administrators to the same extent as himself. (f) Waring hereby warrants Loomis in the quiet and peaceable possession of said premises against his own acts and against any and all persons claiming by, through or under him. Witness our hands and seals this 28th day of May, 1888, in duplicate.

J. A. Loomis (Seal)

“Guy Waring (Seal)”

“In presence of Thomas C. Griffiths. A. Waltman.

To the amended complaint setting forth this contract, a demurrer was interposed by defendants and sustained by the trial court. Upon appeal this ruling of said court was reversed. *Waring v. Loomis*, 35 Wash. 85, 76 Pac. 510. The main contention was that the contract was void because it contemplated obtaining title to government land unlawfully. This court, declining to uphold this contention, said:

“There are various ways by which title can be acquired to the public land of the United States, even though it be agricultural in character, only some of which are inconsistent with a contract of this kind. This being the case, it will not be presumed that the parties intended to violate the law. On the contrary, it is a rule of interpretation that, when a contract is open to two constructions, by one of which it would be lawful and the other unlawful, the former must be adopted.”

It is now urged that the purpose of the parties to this agreement, at the time of its making, was to acquire the property as a homestead by Loomis, which would necessarily involve fraud and perjury. It is conceded, however, that the title was afterwards obtained from the government honestly and according to law. It is evident that the ultimate purpose of the parties to the contract was to so arrange the matter that each should eventually receive a half interest in the land, or that Loomis should acquire the title thereto to be held subject to appellant's right to a half interest therein. This purpose could be attained by either of two methods—one lawful, the other unlawful. In the light of the agreement Loomis could not “prove up” upon the land as a homestead without committing perjury. But he could acquire title to the land,

Feb. 1908]

Opinion Per Root, J.

or cause it to be acquired, from the government under the "mining laws," and do so legitimately. He did the latter, and no question is made as to the legality of this acquisition. Even if the original intention had been to secure title under the homestead law, we doubt if Loomis or his successors in interest could be heard to urge that fact as a defense at this time, inasmuch as such purpose was not carried out, but abandoned for one that was perfectly lawful. However, we do not think the evidence establishes an intention to acquire the property from the government in an unlawful manner. Both parties knew that the land could not be obtained under the homestead law without fraud and perjury. It was because of this that they consulted an attorney as to how they could arrange the matter. In the absence of clear and convincing evidence, it will not be presumed that the attorney drafted, and they, pursuant to his advice, executed a contract with the intention of carrying out its terms in a criminal manner when it was susceptible of a lawful performance. Under the pleadings and evidence, we think appellant is entitled to a decree awarding him an undivided one-half interest in and to the property in question.

The judgment and decree of the honorable superior court is reversed, and the cause remanded with instructions to enter a decree as above indicated, in appellant's favor.

HADLEY, C. J., FULLERTON, and CROW, JJ., concur.

[No. 7034. Decided February 26, 1908.]

M. H. WHITEHOUSE, *Appellant*, v. W. H. COWLES *et al.*,  
*Respondents*.<sup>1</sup>

**LIBEL AND SLANDER—COMPLAINT.** A complaint for libel setting out the publication of the fact that plaintiff secured a marriage license, attempted to suppress the fact, and could not find the bride, is demurrable for want of sufficient facts, where it contains no inducement or innuendo and it is not alleged that any of the statements published are false; the statements not being libelous *per se*.

**SAME—CONDITIONS PRECEDENT—NOTICE TO PUBLISHER—EVIDENCE—SUFFICIENCY.** Under Laws 1899, p. 101, requiring, as a condition precedent to an action for newspaper libel, the service of notice upon the publisher for a retraction of the publication, an action for libel is properly dismissed, where the only proof that the person served with notice was publisher of the paper at the time of publication consisted of a contract purporting to be signed by him as publisher, by one Y, his business manager, some months prior to the publication, and of two checks signed by him describing him as publisher of the paper, dated six to eight months after the publication of the libel.

Appeal from a judgment of the superior court for Spokane county, Joiner, J., entered December 15, 1906, upon the verdict of a jury rendered by direction of the court, dismissing an action for libel. Affirmed.

*Willis H. Merriam* and *A. G. Gray*, for appellant.

*H. M. Stephens*, for respondents.

**Root, J.**—Plaintiff brought this action to recover damages alleged to have been occasioned by certain matters published in the *Spokesman-Review*, of which defendants are alleged to have been the publishers. From a judgment of dismissal, this appeal is prosecuted.

Two causes of action were set forth in the amended com-

<sup>1</sup>Reported in 93 Pac. 1086.

Feb. 1908]

Opinion Per Root, J.

plaint. The first cause of action was based upon the following article published in said newspaper:

"That on the 14th day of July, 1904, at Spokane, county of Spokane and state of Washington, the defendants published a newspaper called the Spokesman-Review, that on said 14th day of July, 1904, the defendants published in said newspaper the following words of and concerning the plaintiff:

"Secured license but no bride. Matrimonial plans of well known Spokane Pioneer fail of Realization. M. H. Whitehouse-Clara Reed. Fifty-year old would be Benedict does not know where prospective bride is.

"Mysterious unforeseen circumstances have intervened to prevent the contemplated marriage of M. H. Whitehouse, a well known pioneer citizen of Spokane, to Clara S. Reed. What the circumstances are Mr. Whitehouse declines to explain and diligent efforts to locate the prospective bride, in order to ascertain her version of the story, have proven unavailing. Mr. Whitehouse secured the license at the office of the county auditor last Saturday. He appeared at the office about the hour of closing and by arrangement with Auditor Stewart, planned to have the license issued to him recorded after the office had been closed and kept from the public and the press until Monday morning. Mr. Stewart signed the application for the license as witness identifying the prospective bridegroom and certifying that the prospective bride is of marriageable age. Monday Mr. Whitehouse appeared at the county auditor's office again to ascertain whether the fact that the license had been issued could not be withheld from the public, and, upon ascertaining that it could not be arranged with the auditor's office, again set out in search of the reporters with a view of urging them to withhold the publication. Whatever the reason the marriage has not occurred. Mr. Whitehouse when seen last night at his place of business at 1025 Sprague Ave., said: 'I am not married and there appears no immediate prospect that I shall be. Further than this I have nothing to say.' Who is Clara E. Reed, the woman in the case? he was asked. 'I do not know who she is, nor where she is. In fact I know nothing about her. I have nothing to report. When there is anything to report, I will let you know.' In the application for the marriage license Mr.

Whitehouse gave his age as 50 years and that of his prospective bride 37. Mr. Whitehouse has lived in Spokane for a number of years and makes his home at E. 2103 Fourth ave. He is engaged in the millinery business on Sprague Ave. near Lincoln street.' ”

There is no direct allegation that any one of these statements is untrue, and only by inference or implication does it appear that any portion is untrue. There is nothing to show that respondent Cowles had any knowledge of the publication of the article, or had anything to do personally therewith. A demurrer to this cause of action was sustained by the trial court.

We do not think that the language of the published article constitutes a libel *per se*, and there is no inducement, colloquium, or innuendo pleaded. The ruling of the trial court in sustaining the demurrer to the first cause of action must be sustained.

The defendants interposed an answer to the second cause of action. A motion to strike a portion of this answer was made by plaintiff, and denied by the trial court. Plaintiff then demurred to the answer, but his demurrer was overruled. These rulings are assigned as error; but it is unnecessary for us to pass upon them by reason of our conclusion relative to another question in the case. The statute, Laws 1899, page 101, provides that, before any action for libel shall be brought, the aggrieved party shall serve notice on the publisher or publishers of the newspaper, specifying the statements in said article which such party alleges to be false and defamatory. Such a notice was served upon Cowles; but at the trial there was no competent evidence to prove that he was the publisher of the paper on the 19th of July, 1904, the date when the offending article appeared. The proof offered to establish this fact consisted of two checks, dated respectively December 10, 1904, and March 21, 1905, and a contract dated May 19, 1904, the checks being signed, “The Review Publishing Co., W. H. Cowles, Publisher,” and the contract being signed,

Feb. 1908]

Statement of Case.

"The Review Publishing Co., W. H. Cowles, Publisher, by J. F. Young, Business Manager." It will be noticed that the dates of these instruments are considerably removed from that upon which the article in question was published; that none of them bears the signature of the respondent company; and that in the contract the name of Cowles appears to have been signed by another. In the light of these facts and the rule of law against proving agency by the declarations of an alleged agent, it must readily appear that the proffered documents were, as primary evidence, incompetent. This was the view of the trial judge who directed a verdict in favor of the defendants, and upon which the judgment of dismissal was entered.

Finding no error in the record, the judgment is affirmed.

HADLEY, C. J., CROW, and MOUNT, JJ., concur.

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[No. 7118. Decided February 26, 1908.]

LOUIS HENDELMAN, *Appellant*, v. BERNHARD KAHAN *et al.*,  
*Respondents*.<sup>1</sup>

APPEAL—REVIEW—ORDER DISSOLVING ATTACHMENT. An order dissolving an attachment issued on the ground of a conveyance of property with intent to defraud creditors, heard upon affidavits filed by each party, will not be disturbed on appeal unless clearly erroneous.

ATTACHMENT—DISSOLUTION—REASONABLE CAUSE. Upon dissolution of an attachment, the court need not enter a finding that there was reasonable ground for the attachment, the same being immaterial in such action.

Appeal from an order of the superior court for Spokane county, Huneke, J., entered May 4, 1907, upon findings in favor of the defendants, dissolving a writ of attachment, after a trial on the merits before the court without a jury. Affirmed.

<sup>1</sup>Reported in 93 Pac. 1074.

*Robertson & Rosenhaupt*, for appellant.

*Belt & Powell*, for respondents.

Root, J.—This is an appeal from an order of the superior court dissolving an attachment. The writ issued upon an affidavit setting forth that defendants were about to convert their property, or a part thereof, into money for the purpose of defrauding their creditors. Upon the motion to dissolve the attachment, several affidavits were filed by each party. From these the trial court found the writ to have been improperly or irregularly issued, and made an order dissolving the same. Such an order will not be disturbed by an appellate court unless clearly erroneous. *Bingham v. Keylor*, 25 Wash. 156, 64 Pac. 942; *Gehres v. Orlowski*, 36 Wash. 156, 78 Pac. 792; *Bender v. Rinker*, 21 Wash. 633, 59 Pac. 504. We think the action of the trial court in dissolving the attachment was justified.

Appellant requested that court to incorporate in the order of dissolution a recital that there was reasonable ground for suing out the attachment. The court having refused to do so, its refusal is assigned as error. The question of reasonable cause might be material in a suit upon the attachment bond; but it is not so in this action.

No error appearing, the judgment of the trial court is affirmed.

HADLEY, C. J., FULLERTON, CROW, and MOUNT, JJ., concur.

Feb. 1908]

Opinion Per MOUNT, J.

[No. 7028. Decided February 27, 1908.]

W. E. LARSON, *Appellant*, v. J. B. LORER, *Respondent*.<sup>1</sup>

APPEAL—REVIEW—VERDICT. A general verdict for a defendant, in an action on a contract, will not be set aside upon appeal where there was a direct conflict of evidence upon an affirmative defense as to a mutual rescission of the contract.

Appeal from a judgment of the superior court for Asotin county, Miller, J., entered May 14, 1907, upon the verdict of a jury rendered in favor of the defendant, in an action for a broker's commissions for the sale of real estate. Affirmed.

*Sturdevant & Bailey* and *I. N. Smith*, for appellant.

*Elmer E. Halsey* and *Ben F. Tweedy*, for respondent.

MOUNT, J.—The appellant, a real estate broker, brought this action to recover commissions for an alleged sale of certain farm lands for the respondent. The complaint alleged a written contract for commissions between appellant and respondent, a sale of the respondent's land, and a refusal on the part of the respondent to pay the commission. The answer admitted the making of the contract, but denied all the other allegations of the complaint. As a further defense, the answer alleged that appellant and respondent mutually rescinded the written contract, and that subsequently respondent exchanged his farm land for another farm without the aid of appellant. The affirmative allegations of the answer were denied. Upon these issues, and others not necessary to mention, the case was tried to the court and a jury. The result was a verdict for respondent. The plaintiff appeals.

The appeal is based upon the contention that the evidence is insufficient to justify the verdict. The appellant makes no claim that there was any error in the admission or rejection of evidence, or that any error was committed by the trial

<sup>1</sup>Reported in 94 Pac. 109.

court in instructing the jury. From an examination of the evidence brought here, we find that there was a direct conflict in the evidence as to whether a mutual rescission of the contract for commissions had taken place between appellant and respondent before the sale or exchange of the property by the respondent. If there was such rescission, of course there could be no recovery upon the contract. This question under the evidence was exclusively for the jury, which might well have found, and which we think did find, in favor of the defendant that there was such rescission. In the absence of a negative finding upon this question, we cannot assume that the jury considered other questions, for if there was a rescission, as alleged, it was not necessary for the jury to consider the other questions in the case. The question of rescission being a question of fact, and properly presented to the jury, controls the case. The judgment must therefore be affirmed.

HADLEY, C. J., CROW, ROOT, and FULLERTON, JJ., concur.

[No. 7017. Decided February 27, 1908.]

M. C. ALLEN, *Respondent*, v. H. W. TREAT *et al.*,  
*Appellants*.<sup>1</sup>

VENDOR AND PURCHASER—PERFORMANCE OF CONTRACT—RESCISSION BY VENDOR—EVIDENCE—SUFFICIENCY. Evidence examined and held to sustain findings that the purchaser of land had failed to comply with the terms of the contract, warranting rescission by the vendor.

EVIDENCE—PAROL—WRITTEN CONTRACT—VENDOR AND PURCHASER—TITLE—SUFFICIENCY—EXCUSE FOR NONPERFORMANCE. Parol evidence is admissible to show that a written contract for the sale of land had been induced by the vendee's agent, who knew that the vendors would sell only for cash to be paid at once, by representing that the vendees would take the land subject to the claims of squatters and expedite the sale without the delay incident to a suit for their removal from the land, although the same was not embraced in the

<sup>1</sup>Reported in 94 Pac. 102.

Feb. 1908]

Opinion Per CROW, J.

contract, which called for a good title; knowledge of the agent being imputed to the vendee; and possession by such squatters would be no excuse for failure to comply with the contract.

**VENDOR AND PURCHASER—TITLE — SUFFICIENCY — ESTOPPEL — SPECIFIC PERFORMANCE.** A vendee contracting for a good title to be conveyed within a few days, knowing of the possession of squatters, which was an apparent cloud but did not invalidate the title, is estopped from excusing his nonperformance on that ground, especially where, with the cloud still existing, he afterwards seeks specific performance, which accordingly will not be granted.

Appeal from a judgment of the superior court for King county, Frater, J., entered May 25, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to recover possession of real property and to quiet title thereto. Affirmed.

*John P. Hartman*, for appellants.

*W. T. Dovell*, for respondent.

CROW, J.—This action was commenced by M. C. Allen, a widow, against H. W. Treat and Olive Treat, his wife, to recover possession of land in King county, to quiet title thereto, and to cancel a written contract reading as follows:

“It is hereby mutually agreed by and between Mrs. M. C. Allen, of Seattle, Washington, party of the first part, and H. W. Treat, the party of the second part, that said party of the first part will sell to said party of the second part, his heirs or assigns, and the said party of the second part will purchase of said party of the first part, her heirs, executors or administrators [description of land]. (1) The purchase price for said land is thirty-five hundred dollars, of which the sum of three hundred dollars has this day been paid as earnest, the receipt whereof is hereby acknowledged by said party of the first part, and the further sum of thirty-two hundred dollars to be paid within five days after delivery of abstract and warranty deed. (2) Said land to be conveyed by a good and sufficient deed to said party of the second part, when said purchase price shall have been fully paid. (3) Time is the essence of this contract. (4) And the party of

the second part is to pay all taxes, assessments, and impositions that may be legally levied or become due upon said property after this date. (5) If the said party of the second part fail to pay the whole or any part of said purchase price and interest according to the terms above specified, then the said party of the first part may, if she so elect, rescind this contract, and in that case all payments made by said party shall be forfeited. (6) Abstract of title to be satisfactory to second party, or deposit to be returned.

"Witness our hands and seals in duplicate this 7th day of February, A. D. 1906.

M. C. Allen. (Seal)

"H. W. Treat. (Seal)"

The complaint alleges that the defendants had failed to perform the conditions of the contract; that they did, for five days after delivery of the abstract and warranty deed and at all times, neglect and refuse to pay the \$3,200, remainder of purchase price, as agreed; that they had wrongfully taken possession, and that they had caused the contract to be recorded, casting a cloud upon the title. The defendants in their answer and cross-complaint alleged that the contract was executed, acknowledged, and recorded; that about ten days after its execution the plaintiff delivered to the defendant H. W. Treat an abstract of title, which he returned within five days, calling plaintiff's attention to certain defects; that after a few days plaintiff agreed to perfect the title by bringing an action to remove the cloud thereon; that upon such assurance and the bringing of the action, the defendants agreed and were ready to complete the transaction and pay the purchase money to one E. B. Cox, the plaintiff's agent; that the agent was then unable to find plaintiff who had left the city of Seattle for the state of California; that defendants were thereafter at all times ready and willing to pay the purchase price and accept a warranty deed; that the delay in closing the deal resulted solely from the fault of the plaintiff; that about March 1, 1906, the defendant H. W. Treat attempted to make a tender to plaintiff's agent, the First National Bank of Seattle, she having left a deed with the bank;

Feb. 1908]

Opinion Per CROW, J.

that defendant demanded the deed, but that the bank refused to deliver the same except upon the payment of a larger sum, to wit, \$4,700, and that after plaintiff's return to the state of Washington, the defendant H. W. Treat demanded a deed and offered to pay the purchase money, but that plaintiff then refused to convey. Upon these allegations the defendants asked a decree of specific performance.

The trial court found that the defendants entered upon the land without right or title, and ousted plaintiff; that they had at all times failed to perform the contract; that they failed for five days after delivery of the abstract and warranty deed to pay the stipulated price; that they had caused the contract to be recorded, casting a cloud upon plaintiff's title; that the said E. B. Cox acted as purchasing agent for the defendant H. W. Treat, being authorized by him to conduct all negotiations looking to the purchase of the property; that at the time of making the contract E. B. Cox had full knowledge of the condition of the title; and that he and the defendant H. W. Treat thereupon agreed to take the existing title and pay the stipulated price therefor; that about February 10, 1906, the plaintiff delivered an abstract of title to E. B. Cox, agent for H. W. Treat, which disclosed that the plaintiff held a clear title to the land; that subsequently the plaintiff executed a warranty deed to H. W. Treat and deposited the same with the First National Bank of Seattle for delivery upon receipt of the purchase price, and notified the defendant H. W. Treat thereof; that the deed remained with the bank for delivery, with the knowledge of E. B. Cox and H. W. Treat, until February 19, 1906; that subsequent to the delivery of the abstract and prior to February 19, 1906, H. W. Treat and E. B. Cox were notified by plaintiff that she elected to rescind the contract unless prompt payment of the stipulated purchase money was made; that the defendants never at any time prior to the commencement of this action tendered or offered to pay the sum of \$3,200, or any part thereof; that at the time of depositing the deed the plaintiff, with de-

fendant's knowledge, constituted the First National Bank of Seattle her agent to deliver the deed and receive the purchase money; that after February 23, 1906, E. B. Cox, agent for H. W. Treat, notified the First National Bank in writing that the title to the property would not be accepted; that at no time prior thereto had E. B. Cox or H. W. Treat, or either of them, made any objection to the title, although its condition was at all times known to them; that the contract was not at any time modified in its terms, and that on February 23, 1906, the plaintiff notified H. W. Treat that she had rescinded the contract. Upon these findings, conclusions of law were made, and a decree was entered cancelling the contract, quieting plaintiff's title, and awarding her possession of the land. The defendants have appealed.

The controlling question before us is whether these findings are sustained by the evidence. We think they are, and that they authorized the final decree. The evidence shows that the contract was procured by E. B. Cox, who called upon respondent for the purpose of learning whether she would sell the land, he telling her that he could make a sale. The respondent objected to selling on account of certain squatters who were upon the land without right or title, and in substance stated that, as she might experience considerable delay in removing them, and as she would only sell for cash, the purchase money to be promptly paid, she hesitated to make a contract and tie up the land. Mr. Cox, in substance, replied that he knew of the possession of the squatters; that he cared nothing about them; that he owned adjoining land under the same conditions; that he would not hesitate to make a warranty deed therefor, and that his purchaser would take the land subject to such possession, the title being otherwise good. Relying upon this promise the respondent executed the contract.

Appellants do not now claim, nor did they ever claim, that the title was otherwise defective, or that the squatters had any

Feb. 1908]

Opinion Per CROW, J.

legal or equitable rights. They do claim that Mr. Cox was agent for respondent, and that they are not bound by his acts, while she insists that he represented appellants. Most of the negotiations were conducted through him, and the question of his agency therefore becomes an important one. It is conceded that respondent was to allow him a commission out of the \$3,200 purchase money to be paid by appellants, yet the trial court found he was purchasing agent for H. W. Treat. Although the evidence was conflicting upon this issue, we conclude that its preponderance sustains the finding. It being established that Cox was acting as purchasing agent for H. W. Treat, it follows that the communications made to him import knowledge to appellants, and that transactions had with him, within the scope of his authority, were binding upon them.

Appellants contend that the trial court erred in admitting evidence of the respondent, wherein she testified that, before executing the contract, she mentioned the possession of the squatters to appellants' agent; that he waived any objection on account thereof; that he stated his principal, H. W. Treat, would accept the title subject to such possession, if otherwise perfect, and that she relied upon such promise in making the sale. They insist that such evidence tended to vary the written contract which by its terms indicates that the respondent was to convey, and the appellants were to receive, a perfect title, citing *Miller v. Phillips & Co.*, 44 Wash. 226, 87 Pac. 264, and other cases. The evidence was properly admitted. There is no question but that the contract as drawn admits of the construction for which the appellants contend. It is also the rule that its terms may not be varied by oral testimony. The evidence here mentioned was not admitted for any such purpose. The appellant H. W. Treat was exceedingly anxious to purchase this particular land. It appears that he was buying other contiguous property from various owners. He evidently needed it for some business enterprise. The respondent had not offered it for sale, nor did she want to

sell unless the deal could be expedited, the purchase money promptly paid, and the purchaser would consent to accept an otherwise good title, subject to the wrongful possession of the squatters. The appellants' agent, purchasing for them, was advised of this situation, and in substance assured her that appellants would so take the land subject to such possession without making objection to the title on account thereof. Although this stipulation is not incorporated in the written contract, the respondent relied upon it when making the sale, which she otherwise would not have made. Yet the only objection the appellants ever interposed to the title as an excuse for their delay in making payment was the possession of these squatters. They permitted their agent to thus lead the respondent into making the contract, which stipulated that time should be of its essence, and then, on the identical objection waived, attempted to tie up land shown to be rapidly advancing in value, claiming the right to delay payment of the purchase money until the title could be quieted against the squatters. The respondent was entitled to show these occurrences as disclosing acts of the appellants which should estop them from making their present contention.

Other evidence shows that one of the squatters promptly executed a quitclaim deed to respondent; that thereafter the appellants still rejected the title, or rather delayed payment on account of the possession of the other squatters; that they did not, however, surrender their contract, but that their agent Cox filed it for record when appellants were five days in default, and after the respondent had notified them of her intention to rescind. They also seized possession of at least a portion of the land. They now ask specific performance to compel the respondent to convey the identical title which they then refused. In other words, they claim they made no default in payment of purchase money because of the possession of the squatters. Yet they now offer to make payment, and ask for the title subject to such possession. True, they assert there was an agreement that the respondent was to commence

Feb. 1908]

Opinion Per CROW, J.

an action to perfect her title, in consideration of which they agreed to accept the same. This contention, however, is not sustained by the evidence. The respondent did institute such an action against the squatters. That action, however, was commenced after she had notified the appellants of her rescission of the contract. It was brought for her own benefit, and not in pursuance of any supplemental agreement with the appellants. Although her action against the squatters was still pending, no judgment quieting her title had been obtained therein at the time of the trial of this action, wherein appellants are seeking specific performance. Under these circumstances every principle of equity would seem to forbid that appellants should be entitled to compel a conveyance of the identical title which in the first instance they deliberately rejected. *Goldthwait v. Lynch*, 9 Utah 186, 33 Pac. 699.

When, as here, a purchaser contracts for good title to be conveyed within a very few days, at the time knowing it will be impossible for his vendor to strictly give such title within the time named, he should thereafter be estopped from basing an excuse for his nonperformance of the contract upon a defect previously known to him, which although an apparent cloud, does not in reality invalidate the title, especially when he afterwards comes into a court of equity asking specific performance to compel a conveyance of the same title, subject to such cloud.

In *Leonard v. Woodruff*, 23 Utah 494, 65 Pac. 199, the first syllabus, which states the substance of the opinion, reads as follows:

"Where a vendee, on entering into a written contract for the sale of real estate, knows that there is a squatter in possession of a portion of the property, and the written contract does not refer thereto, or to the character of the vendor's title, there is no implied contract to furnish a good and marketable title as against such squatter."

See, also, *Thompson v. Hawley*, 14 Ore. 199, 12 Pac. 276; *Newark Sav. Inst. v. Jones*, 37 N. J. Eq. 449; *May v. Ivie*, 68 Tex. 381, 4 S. W. 641.

It is unnecessary to further discuss the appellants' contentions or assignments of error. Under the findings made by the trial court, which we have approved, appellants are not entitled to a decree of specific performance. On the other hand, the respondent, who tendered timely performance as fully, completely, and equitably as could have been demanded or required of her, is entitled to the final decree which has been entered in her favor.

The judgment is affirmed.

HADLEY, C. J., MOUNT, and RUDKIN, JJ., concur.

DUNBAR, ROOT, and FULLERTON, JJ., took no part.

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[No. 7050. Decided February 27, 1908.]

CALVIN THOMAS, *Respondent*, v. SEATTLE BREWING  
& MALTING COMPANY *et al.*, *Appellants*.<sup>1</sup>

CHATTEL MORTGAGES — PAYMENT — TENDER AFTER DEFAULT. A tender of the amount due on a chattel mortgage, with costs, made before sale, discharges the lien of the mortgage, pending foreclosure, rendering a sale thereunder void.

TENDER—KEEPING GOOD—PAYMENT INTO COURT—REPLEVIN. In an action of claim and delivery for property wrongfully sold under a chattel mortgage, the tender of the amount due on the mortgage before foreclosure sale, entitling the plaintiff to the property, need not be kept good by bringing the money into court.

CHATTEL MORTGAGES — TENDER — SUFFICIENCY. A tender of the amount due on a chattel mortgage before sale, made by one to whom the mortgagor had sold the property, will be held sufficient where the amount was concededly correct and the jury found upon proper instructions that the rights of the party making the tender were disclosed to the officer or mortgagee.

MOUNT, FULLERTON, and ROOT, JJ., dissenting.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered May 7, 1907, upon find-

<sup>1</sup>Reported in 94 Pac. 116.

ings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action of replevin. Affirmed.

*William A. Greene* and *Gordon D. Eveland*, for appellants, contended, among other things, that tender after default does not discharge the lien of a chattel mortgage. *Brown v. Be-ment*, 8 Johns. 96; *Langdon v. Bucl*, 9 Wend. 80; *Patchin v. Pierce*, 12 Wend. 61; *Jackson v. Cunningham*, 28 Mo. App. 354; *Blodgett v. Blodgett*, 48 Vt. 32; *Alexander v. Mcyenberg*, 112 Ill. App. 223; *Holzhausen v. Parkhill*, 85 Wis. 446, 55 N. W. 892; *Hill v. Merriman*, 72 Wis. 483, 40 N. W. 399; *John O'Brien Lumber Co. v. Wilkinson*, 123 Wis. 272, 101 N. W. 1050. The tender must be kept good. *Gauche v. Milbrath*, 94 Wis. 674, 69 N. W. 999; *Smith v. Phillips*, 47 Wis. 202, 2 N. W. 285; *Schaffer v. Castle*, 6 Ind. Ter. 244, 91 S. W. 35; *Maxwell v. Moore*, 95 Ala. 166, 10 South. 444, 36 Am. St. 190; *Himmelman v. Fitzpatrick*, 50 Cal. 650.

*E. C. Dailey* (*G. C. Israel* and *Frank C. Owings*, of counsel), for respondent, contended, that under our statute a chattel mortgage conveys no title. *Byrd v. Forbes*, 3 Wash. Terr. 318, 13 Pac. 715; *Silsby v. Aldridge*, 1 Wash. 117, 23 Pac. 836; *Kerron v. Northern Pac. Lum. & Mfg. Co.*, 1 Wash. 241, 24 Pac. 445; *Binnian v. Baker*, 6 Wash. 50, 32 Pac. 1008; *Sayward v. Nunan*, 6 Wash. 87, 32 Pac. 1022; *Voorhies v. Hennessy*, 7 Wash. 243, 34 Pac. 931; *Brookman v. State Ins. Co.*, 15 Wash. 29, 45 Pac. 655, 46 Pac. 243. It was not necessary to keep the tender good after its refusal and conversion of the property. *Gauche v. Milbrath*, 94 Wis. 674, 69 N. W. 999; *Lambert v. Miller*, 38 N. J. Eq. 117; *Weeks v. Baker*, 152 Mass. 20, 24 N. E. 905; *Roberts v. White*, 146 Mass. 256, 15 N. E. 568; *Schayer v. Commonwealth Loan Co.*, 163 Mass. 322, 39 N. E. 1110; *Bacon v. Hooker*, 173 Mass. 554, 54 N. E. 253; *Shattuck v. Colc*, 91 Mich. 580, 52 N. W. 69; *Blaisdell v. Scally*, 84 Mich. 149,

47 N. W. 585; *Bateman v. Blaisdell*, 33 Mich. 357, 47 N. W. 223; *Bateman v. Blake*, 81 Mich. 227, 45 N. W. 831; *Flanders v. Chamberlain*, 24 Mich. 305; *Moore v. Norman*, 43 Minn. 428, 45 N. W. 857, 19 Am. St. 247, 9 L. R. A. 55; *Bartel v. Lope*, 6 Ore. 321; *Mitchell v. Roberts*, 17 Fed. 776; *Lord v. Horr*, 30 Wash. 477, 71 Pac. 23; *Davies v. Dow*, 80 Minn. 223, 83 N. W. 50; *Lamplay v. Weed & Co.*, 27 Ala. 621.

RUDKIN, J.—On the 5th day of March, 1904, W. M. Hart mortgaged certain personal property to the Seattle Brewing & Malting Company, to secure the payment of the sum of \$1,000, payable in installments of \$50 per month. Hart made default in his payments, and the mortgagee proceeded to foreclose its mortgage by notice and sale under Bal. Code, § 5870 *et seq.* (P. C. § 6536). The date of sale was fixed for January 8, 1907. On the day preceding, Hart transferred the mortgaged property, or at least the greater portion of it, to the plaintiff in this action. On the 8th day of January, and prior to the sale, the full amount of the mortgage debt, with interest and accrued costs, was tendered to the sheriff and mortgagee, but the tender was refused and the property was thereafter sold and bid in by the defendant brewing company. This action was thereupon brought in claim and delivery, against the sheriff and the purchaser, for a return of the property and damages, or for judgment for the value in case a return could not be had. From a judgment in favor of the plaintiff, the defendants have appealed, and the following questions are presented for the consideration of this court: (1) Does a tender of the amount due under a chattel mortgage before sale discharge the mortgage lien; (2) if so, in an action of claim and delivery to recover the mortgaged property, must the tender be kept good; and (3) was a sufficient tender shown in this case.

“At common law a tender of the mortgage debt on the law-day satisfies the condition of the mortgage, and discharges

the property from the incumbrance as effectually as payment; but the debt remains, and its payment may be enforced by an action at law against the mortgagor. And in pleading a tender on the law-day in discharge of the condition of the mortgage, the mortgagor is not required to allege continued readiness to pay, nor need he bring the money into court. The tender, when made, discharges the incumbrance, not conditionally, but absolutely and forever." *Mitchell v. Roberts*, 17 Fed. 776.

See, also, Jones, *Mortgages* (6th ed.), § 891; *Kortright v. Cady*, 21 N. Y. 343; *Moore v. Norman*, 43 Minn. 428, 45 N. W. 857, 19 Am. St. 247, 9 L. R. A. 55.

This was the established rule at common law when tender was made on the law-day, and also in case of pledges of personal property where title did not pass until after sale. In the states where both real and chattel mortgages have been converted into mere liens, it has very generally been held that a tender at any time before foreclosure and sale has the same effect as a tender on law-day at common law, and there would seem to be no sound reason why the rule should be otherwise. *Bartel v. Lope*, 6 Ore. 321; *Moynahan v. Moore*, 9 Mich. 8; *Flanders v. Chamberlain*, 24 Mich. 306; *Loughborough v. McNevin*, 74 Cal. 250, 14 Pac. 369, 15 Pac. 773, 5 Am. St. 435. Nor is it necessary that the tender should be kept good or the money brought into court. *Moore v. Norman*, *Flanders v. Chamberlain* and *Mitchell v. Roberts*, *supra*. In *Weeks v. Baker*, 152 Mass. 20, 24 N. E. 905, the court said:

"We have been referred to no precedent for holding, in accordance with the defendant's contention, that a plaintiff before bringing his suit should carry into court the money tendered, or that, having brought a suit which he had a right to bring, his right to maintain it will be forfeited unless he makes profert of money at the time of entering his writ. The rights of the parties to an action are ordinarily to be determined as of the time of bringing the suit. This is always so unless something that has afterwards occurred which may properly be pleaded is shown in defence."

In order that a tender may have the effect of discharging a mortgage lien, the proof must be clear that the tender was fairly made and deliberately and intentionally refused by the owner of the mortgage or some person duly authorized to act for him. In this case the fact and sufficiency of the tender are conceded in so far as the amount is concerned, but it is contended that the tender was not made by the mortgagor, and that the rights of the parties who made the tender were not disclosed or made known to the officer or the mortgagee. But the jury were fully and fairly instructed on this point, and we are not disposed to interfere with their verdict.

The judgment of the court below is therefore affirmed.

HADLEY, C. J., CROW, and DUNBAR, JJ., concur.

ROOT, J., dissents.

MOUNT, J. (dissenting)—I think there was no proper tender made prior to the sale, and therefore dissent.

FULLERTON, J., concurs with MOUNT, J.

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[No. 6959. Decided February 28, 1908.]

H. D. MOORE *Appellant*, v. EDWARD SCHARNIKOW, TRUSTEE,  
*Respondent*.<sup>1</sup>

APPEAL—DISMISSAL—QUESTIONS REVIEWED. An appeal from a judgment dismissing an action for failure to file a bill of particulars will not be dismissed for the reason that no abuse of discretion appears; since that is a question to be determined on the merits of the appeal and not on motion to dismiss.

BILL OF PARTICULARS—SERVICES OF ATTORNEY—SUFFICIENCY. In an action by an attorney for services, it is error to require the plaintiff to file a bill of particulars placing a valuation on each item of the service, where the employment was all in one continuous matter and it appeared that the services were so blended together and related to each other that it was impossible to separate one service from another; since bills for the services of an attorney stand upon a different footing from other claims.

<sup>1</sup>Reported in 94 Pac. 117.

Feb. 1908]

Opinion Per FULLERTON, J.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered May 15, 1907, upon failure of the plaintiff to furnish a sufficient bill of particulars, dismissing an action by an attorney to recover for legal services rendered. Reversed.

*Moore & Park*, for appellant.

*Wilson R. Gay*, for respondent.

FULLERTON, J.—The appellant, who is an attorney at law, brought this action to recover from the respondent the sum of \$12,000, alleged to be due for legal services performed by him for and on behalf of the respondent. In his complaint he did not set forth in detail the services rendered for which he demanded judgment, but set them forth in general terms, claiming the amount due as a balance after certain payments had been deducted. The respondent filed a demand for a bill of particulars, to which a motion to strike was interposed. This motion was granted in part and denied in part, whereupon the appellant filed a bill of particulars as follows:

“That on or about the 7th day of January, 1905, the plaintiff was retained as an attorney and counselor at law, by F. C. Webster acting as trustee of the estate of Christopher P. Higgins, deceased, and counselled and advised said F. C. Webster in and about certain claims of title affecting certain lands, to wit: The southeast quarter of section 35, in township 26 north of range 3, E. W. M., the property of said estate, and continued to counsel and advise said Webster, for the use and benefit of said estate up to the date of the appointment and qualification of the defendant Edward Scharnikow as trustee of said estate; and counselled and advised said F. C. Webster and said Edward Scharnikow in and about the legal matters and procedure followed in making a proper and valid appointment of said defendant as trustee of said estate, and in counselling and advising said defendant in regard to the claims aforesaid.

“That on to wit: The 29th day of April, 1903, plaintiff at the special instance and request of defendant, brought a certain suit on behalf of defendant in the United States cir-

cuit court for the western district of Washington, ninth circuit, for the recovery of the possession and quieting of title to said property, said suit being entitled Edward Scharnikow, as Trustee of the Estate of Christopher P. Higgins, deceased, vs. Julius Jasperson et al., that plaintiff, as the attorney of record of said Edward Scharnikow, as aforesaid, drew all of the pleadings, interrogatories and all other papers on behalf of the defendant herein, searched for testimony and for witnesses on his behalf, and made divers trips and journeys to the city of Ballard; made one journey to Grass valley in the state of California and to Nevada City, for the purpose of securing evidence to be used on behalf of this defendant in said cause, and to Olympia, for the same purpose; that plaintiff prepared the brief of the facts and the brief of the law in said cause, and attended upon the trial of said cause, and did and performed all that it was necessary to be done as attorney for said defendant in and about said cause; that he conducted the same successfully and recovered a judgment in favor of this defendant for the possession of said property and the quieting of the title thereto and against the parties claiming adversely to this defendant, and recovered a judgment for the sum of one thousand dollars damages and the costs of said suit; that plaintiff took out a writ of restitution and a writ of execution and caused the same to be served.

"That the defendants in said action moved for a new trial and this plaintiff appeared for the defendant herein and argued the same in his behalf, said motion being by the court denied.

"That afterwards, the defendants in said action sued out a writ of error in said cause, to the United States circuit court of appeals, this defendant being the defendant in error therein; that plaintiff at the request and instance of said defendant, appeared as attorney of record for said defendant in error, and performed all services in settling the bill of exceptions, preparing the brief for defendant in error, attending at the trial and argument of said cause, and making the argument on behalf of the defendant herein before said United States circuit court of appeals, and doing all and singular everything necessary and proper to be done and performed by an attorney of record, for said defendant in error in said cause; that said writ of error, having been fully considered by said court, a judgment was entered therein in favor of said

Feb. 1908]

Opinion Per FULLERTON, J.

defendant in error, affirming the judgment rendered by the circuit court.

"That plaintiff at the special instance and request of said defendant, appeared on behalf of the defendants in a certain cause in the superior court for King county, state of Washington, entitled Julius Jasperson et al., vs. J. E. Graham and S. B. Graham, defendants, and prepared and served an answer therein, which said cause involved the question of the title to said property, by reason of the fact that it was brought by said plaintiffs therein to recover the value of certain piling, sold by the defendant herein to the defendants in said last mentioned cause, and cut and removed by them from the property herein described.

"That plaintiff during all the times herein mentioned counselled and advised the said defendant herein, in regard to the management and disposition of said property and other property belonging to said defendant as such trustees, situated in said county of King; that all of the services done and performed by this plaintiff, were done and performed between the said 7th day of January, 1905, and the date of the commencement of this action; and that said services were reasonably worth the sum of fifteen thousand dollars; that plaintiff has received in part payment thereof, the total sum of three thousand dollars. That all his expenditures in said matters have been fully paid and discharged, and all accounts settled, except as to the amount due plaintiff for his attorney's fees for the services hereinbefore set forth."

On the filing of the statement the respondent moved that the appellant be required to further particularize his account in the following manner: (1) That he state distinctly the amount of his charges against the respondent for his services as counsel while Webster was trustee of the estate. (2) That he state the amount of his charges for counsel and advice in procuring a legal appointment of the respondent as trustee. (3) That he show what his charges per diem were each day he was away from his office on the necessary business of attending to the legal affairs incident to the suit. (4) That he state the amount of his charge for the preparation and trial of the case in the Circuit Court of the United States, includ-

ing the suing out of the writ of restitution and filing a praecipe of execution. (5) That he state the amount of his charge for the preparation and argument of the motion for a new trial in the district court. (6) That he state the amount of his charge for the preparation of the defendant in error's cause on an appeal to the United States Circuit Court of Appeals; also for the preparation of defendant's brief and the oral argument of said cause on appeal. (7) That he state the amount of his charge for his appearance in behalf of the defendant and preparing the answer in that certain cause entitled Julius Jasperson et al. v. Graham et al., defendants.

The appellant appeared and opposed this demand on the ground that his first bill of particulars was sufficiently definite. The court, however, granted the motion. In compliance therewith the appellant filed the following:

"(1) That he is the plaintiff in the above entitled action; that the defendant, Edward Scharnikow, Esq., is an attorney at law and is as well advised, through personal knowledge and correspondence of all of the particulars of plaintiff's demands and services mentioned in plaintiff's 2nd amended complaint, bill of particulars on file herein, and the matters hereinafter set forth, as is this deponent.

"(2) That the services rendered by plaintiff were so blended and related to each other than it is impossible to separate one service from another and fix a separate charge therefor.

"(3) That it was understood and agreed between plaintiff and defendant, that the fees of plaintiff should be partially contingent upon the result of the principal action mentioned in said bill of particulars, in this to wit: That if plaintiff finally recovered the property involved, that he was to receive a larger fee than if unsuccessful therein; that plaintiff was therefore unable to fix a charge for each item of service rendered, or of the separate matters demanded by defendant, but claimed a gross sum for the whole thereof, basing the same upon the character and amount of the services rendered and the amount of the responsibility involved in the action for the recovery of the property; that said property was of the rea-

Feb. 1908]

Opinion Per FULLERTON, J.

sonable worth and value of one hundred and fifty thousand dollars at the date of the final termination of said litigation; that any statement of the value of any of his services in the successive steps in said litigation, would be merely an expression of plaintiff's opinion thereon.

"(4) Particularly answering paragraph number 1 of defendant's motion, deponent says that he makes no charges against said defendant or against the estate of Christopher P. Higgins, for his services as counsel to F. C. Webster, up to the date said Webster resigned as trustee of said estate, to wit: On the 21st day of January, 1905.

"(5) Answering paragraph 2, of defendant's motion, plaintiff deposes and says, that on the 7th day of January, 1905, plaintiff was retained by said F. C. Webster, acting as trustee of said estate to bring a suit for the recovery of the lands described in said bill of particulars; that on the 21st day of January, 1905, said Webster resigned as such trustee and on the same date the defendant was appointed by the fourth judicial district court of the state of Montana, in the probate department thereof, as such trustee and immediately confirmed the action of said Webster in retaining plaintiff and continued the same and instructed plaintiff to bring such suit; that plaintiff was not satisfied with the validity of the appointment of said defendant made as aforesaid, as such trustee, and counselled and advised with said defendant and said Webster in and about the legal matters and procedure to be followed in making a proper and valid appointment of said defendant as trustee of said estate; that said defendant and the court appointing said defendant, followed the advice and counsel of plaintiff, so given, and made a proper and valid appointment of said defendant on the 25th day of April, 1905, and on or about said date defendant was and became duly qualified as such trustee, and received a conveyance of the legal title in fee, in trust, of said described property, but said defendant assumed to act in all matters as such trustee, from and after the date of the resignation of said Webster, to wit: January 21st, 1905; although on account of the doubt as to the legality of his first appointment, the advice and counsel heretofore mentioned was given to said defendant and said Webster conjointly; that no separate charge was made against said defendant, but the same was regarded by this plaintiff as, and the same was, a necessary preliminary to the

bringing of said action, in order to qualify said defendant, to act as plaintiff therein; that said counsel and advice was so blended with the counsel and advice relating to the commencement of said action, that plaintiff is unable to fix a separate charge therefor.

“(6) That in regard to the demand made in paragraph 3, of defendant’s motion, deponent says, that he did not make any per diem charge for each day he was away from his office on the necessary business of attending to the legal affairs incident to said suit, but that such services were considered by him as being a part of his duties as attorney for the said defendant herein, in said suit, and was taken into consideration by him in fixing his fees for the entire matter; that he kept no account of the time he actually spent in the matter, or of the days he was absent from his office, as he did not deem it proper or customary to charge for such services rendered in the course of a suit on a per diem basis; that plaintiff has never received any compensation for said services save and except the sum mentioned in his complaint as having been paid on account of his fees *in toto*, as set forth in his complaint herein.

“(7) Answering the demand contained in paragraph 4 of said motion plaintiff says, that he has not made a separate charge for the services therein mentioned, but has included the same in his general charge for the whole case; that no separate fee was agreed upon, and that he is able only to give his personal opinion as to the value thereof, and that he does not wish to disclose his evidence in this action by stating his opinion at this time.

“(8) Referring to the demands contained in paragraphs 5, 6, and 7, of said motion, plaintiff says that he has not made separate charges for the various services therein mentioned, but has included the same in his general charge for the entire litigation; that no separate fees were agreed upon; that the services therein mentioned were so blended together and related to each other that it is impossible to separate one service from another and state the reasonable value of each item; that plaintiff does not wish to disclose his evidence at this time by stating his opinion as to the value of each separate item therein mentioned, and has not as yet formed such opinion except as the gross value of all of the services in the aggre-

Feb. 1908]

Opinion Per FULLERTON, J.

gate, which services he believes to be reasonably worth the sum of \$15,000, for the entire matter."

With the bill of particulars the appellant also filed a motion asking to have the second order modified so as to make the bill as returned a compliance therewith. This motion the court denied. The respondent thereupon moved for default and judgment against the appellant for failing to comply with the order of the court. This motion the court granted, entering a judgment of dismissal with costs. This appeal is from the judgment so entered.

The respondent moves the court to dismiss the appeal on the ground that the question whether or not the court would require a bill of particulars was one wholly within its discretion, and is not subject to review except when the discretion has been abused, and that here no abuse of such discretion in making the order "is alleged, argued or shown." But we think the motion not well taken. Whether or not the orders complained of amount to an abuse of discretion in the trial court is the question to be determined on a review of the merits of the appeal; not one that can be determined on a motion to dismiss.

Passing to the merits, we think the court erred in requiring the appellant to place a valuation on each item of the service he claims to have performed for the respondent. In a mercantile account, or in any account which is made up of several and distinct items, it is proper for the court to require that the value of each article be separately stated. So also a physician, since he bases the value of his services on the number of visits made the patient or the number of prescriptions given him, may be required to set out in his bill of items the charge made for each visit, or each prescription. But the services of an attorney cannot justly be measured in any such manner. Where the retainer is general, and he advises his client or performs services in a number of distinct matters, he may properly be required to set out his charge for each separate matter, but when the services all relate to one subject it forms

no just measure of the value of the services to separate the transaction into parts and have the attorney state what charge he made for each several part. The only correct method is to view the services as a whole, since by no other method can one of its most important elements; namely, the result of the service to the client, be taken into account in estimating the value of the service.

From the earliest times the courts have made this distinction between a bill of particulars for an attorney's service and bills of particulars of accounts generally. Thus in the early case of *Randall v. Kingsland*, 53 How. Pr. 512, the court used this language:

"It may well be that an attorney, from prudential considerations, out of a just spirit of remembrance of his services and of rendering a precise charge against his client, and having due regard to the time occupied in his service, may make such constant and precise entries in respect to them, but it is difficult to conceive that while engaged in such an entire and continuous employment to enable a client to effect the settlement of an account in which he is interested, how the attorney could, with any justice, split up his charge for his services into items of fair legal individuality for each time that he saw or conversed with his client on the subject, or each occasion when he gave the matter any consideration, or saw and conversed with an opposite counsel or wrote a note to him on the subject. Such a system of exacting compensation for services as managing attorney in any particular transaction, unless expressing matter of agreement between the parties, would necessarily result in great unfairness, as entirely a departure from any just estimate of the value of an entire service in an entire though continuing employment."

In *Pierce v. Wilson*, 48 Ind. 398, a bill of particulars in the following form was held sufficient:

"George Pierce and John W. Jamison.

"To William C. Wilson, Dr.

"To legal services rendered in the October term of the Tippecanoe Circuit Court, in the case of themselves v. John Doffin and others, to set aside a fraudulent mortgage, two hundred dollars (\$200)."

Feb. 1908]

Opinion Per FULLERTON, J.

In *Davis v. Johnson*, 96 Minn. 130, 104 N. W. 766, the furnishing of a similar statement was held a sufficient compliance with an order requiring a bill of particulars, the court saying:

"Under the circumstances of this case we think the defendant complied with the requirement of the statute. The statement as rendered informed the defendant fully of the character of the services, the manner in which they were rendered, the transaction out of which the services arose, and the aggregate value of the whole. The defendant was thus clearly informed of the services for which the plaintiff was seeking to recover. The complaint alleged that the services were rendered during the months of June, July, August, September, and October; but the statement as served limited the demand to services rendered in the month of June. In view of the nature of legal professional services and the well-known and generally recognized difficulties in the way of preparing a statement so as to fully and fairly describe the services in detail, we think this statement should have been construed with more liberality, and not tested by that degree of strictness which would have been necessary in a statement of merchandise sold and delivered."

In *Donohue v. Pomeroy*, 19 N. Y. Supp. 569, it was held that a statement enumerating the services and making a lump charge for the whole was a sufficient compliance with a similar demand. Passing on the question the court said:

"We do not see but what the defendant has received all the information which it is necessary for him to prepare for trial by the bill of particulars already received. All the services for which claim is made in the complaint are set forth with great particularity in the bill furnished. It cannot be claimed that an attorney, under such circumstances, is bound to affix a charge for each particular service, because they may be so blended and related to each other that it is impossible to separate one service from another. The defendant is aware of all the services which were rendered, and the general charge which is made therefor. If he desires to dispute the service, he has all the information necessary for him to do so; and, if he desires to dispute the value of such services, he has ample opportunity to prepare for such an issue."

The case of *Plummer v. Weil*, 15 Wash. 427, 46 Pac. 648, is not an authority for the position taken by the court below. In that case the appellant sought to recover for services that not only extended over a long period of time but which related to many distinct matters. The court, by its order, required the attorney to set out the several matters in which he claimed to have performed services, and the charges made for each separate matter, but there was no requirement that he split up into parts the services performed in any one distinct matter, and make a charge for each several part. We think, therefore, that the court erred in holding insufficient the bill of particulars furnished by the appellant.

The judgment will be reversed, and the cause remanded with instructions to reinstate the case and require the respondent to answer to the merits.

HADLEY, C. J., CROW, and DUNBAR, JJ., concur.

ROOT and MOUNT, JJ., took no part.

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[No. 7015. Decided February 28, 1908.]

BRYANT LUMBER & SHINGLE MILL COMPANY, *Respondent*,  
v. PACIFIC IRON & STEEL WORKS *et al.*, *Appellants*.<sup>1</sup>

ADVERSE POSSESSION—COLOR OF TITLE—DEED OUTSIDE OF CHAIN OF TITLE. Adverse possession of shore land lots belonging to the state cannot be claimed to be under color of title by virtue of a deed thereof made by a third person who was never in possession and was not shown to have ever had any title thereto.

EJECTMENT—TITLE OF PLAINTIFF. In an action of ejectment plaintiff must recover on the strength of his own title.

SAME—PRIMA FACIE TITLE—PRIOR POSSESSION. In an action of ejectment, where neither party had title, the plaintiff does not make out a case of *prima facie* title by prior possession by showing that defendants obtained permission of the plaintiff to continue an oc-

<sup>1</sup>Reported in 94 Pac. 110.

Feb. 1908]

Opinion Per MOUNT, J.

cupancy, when it appears that defendants had possession prior to the making of an unwarranted claim to the land by the plaintiff, who never had any possession.

LANDLORD AND TENANT—EXISTENCE OF RELATION. Permission to continue an occupancy of land already held, is not sufficient to show a tenancy, where the land was held eighteen years without the payment of rent.

ADVERSE POSSESSION—AGAINST STATE—PAYMENT OF TAXES. The payment of taxes for seven years upon shore land lots does not show title as against the state.

Appeal from a judgment of the superior court for King county, Honorable Henry Ballinger, judge *pro tempore*, entered July 3, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action of ejectment. Reversed.

*James Kiefer*, for appellants.

*J. L. Corrigan and Ballinger, Ronald, Battle & Tennant*, for respondent.

MOUNT, J.—The respondent brought this action in ejectment, to recover from appellants the possession of lots 8 and 9, in block 86, of Denny & Hoyt's supplemental plat to the city of Seattle. The amended complaint alleged title in the plaintiff by mesne conveyance under patent from the United States, and that plaintiff had been in the open, notorious, and exclusive possession of said lots for more than twenty years, the payment of all taxes assessed against the property, and that defendants wrongfully and unlawfully withhold possession from the plaintiff. The appellants, for answer to the complaint, denied the allegations thereof, and alleged adverse possession in themselves since the year 1890.

The only evidence offered to show title in plaintiff is a plat showing these two lots to be shore land lots within the meander lines of Lake Union, and a deed from A. W. Frater, as receiver of the Merchants National Bank of Seattle, conveying

the lots to the plaintiff; and also some tax receipts from King county, showing payment by the plaintiff of the taxes assessed against the lots from 1898 to 1905 inclusive. No evidence was offered tending to show that the title to these lots had ever been conveyed by the United States, or that Frater or the Merchants National Bank had any title or interest in the lots, or that the state had ever parted with any interest. Some evidence was introduced by the plaintiff to the effect that after the execution of the deed by Frater, receiver, on November 10, 1899, the defendants requested of the plaintiff permission to use the lots as they had used them for several years previous, and that such permission was given; that defendants continued to use and improve the lots until June, 1906, when a written lease was demanded from defendants by the plaintiff, which defendants refused to give, and then claimed the right of possession. Plaintiff's evidence also shows that, after the year, 1899, it occupied a portion of the lots by fastening a boom for sawlogs in the water on the lots. At the close of the plaintiff's evidence, the trial court denied defendants' motion for nonsuit. Defendants made no claim of ownership or of the payment of taxes, but denied that their possession was obtained from the plaintiff, or that they had ever requested permission from the plaintiff to use the lots, or that they used the lots by such permission. Defendants' evidence tended to show that they went into possession of the lots in 1889, and had been in the uninterrupted possession ever since, reclaiming the lots by filling them in with earth and other material, and making some few improvements, and stowing lumber and materials thereon, with the intention of purchasing the lots from the state of Washington when the state desired to sell the same.

The court found as facts that the plaintiff went into possession of the lots in 1899, after acquiring the deed from Frater, receiver, and that plaintiff had paid taxes thereon under claim of title; that the lots were shore land lots; that

the defendants had been in possession using the lots since 1899; "that the defendants Pacific Iron & Steel Works and Pacific Iron Works, at the time of entering upon lots 8 and 9, did not claim to be the owners of said property, and did not have color of title thereto, and that after plaintiff had purchased said property from Frater, as stated in finding of fact No. 3, the officers of the defendant corporations obtained permission from plaintiff to use and occupy said lots 8 and 9 in the manner that said defendants had been using said lots, and said plaintiff granted defendants permission so to do; that in the month of June, 1906, the plaintiff requested of the defendants to enter into a lease for all of lots 8 and 9, which request the defendants refused to comply with, and repudiated the plaintiff's title, whereupon the plaintiff demanded possession of the said lots 8 and 9, and the defendants refused to surrender the same or any part thereof; that neither of the defendants questioned the title of plaintiff to said lots 8 and 9 until on or about June, 1906, when plaintiff demanded possession of said premises from said defendants and the said defendants refused to surrender the same or any part thereof;" that defendants had filled in about two-thirds of the area of the lots; that there is no evidence that plaintiff's grantor, Frater, was ever in possession of the lots; that the defendants were in the actual possession of lot 9 and a part of lot 8 at the time the action was begun. Upon these findings the court entered a judgment in favor of the plaintiff.

The appellants contend that the court should have dismissed the action for the reason that the plaintiff failed to show title or right of possession. This position must be sustained. There was no effort made to show title in the plaintiff except by a deed from Frater, as receiver to plaintiff. It does not appear that Frater, as receiver or otherwise, ever had any title to the lots in question, or any interest therein. The court found that he never had possession. The court also

found that the lots were shore land lots, which would place the title in the state of Washington. *Van Siclen v. Muir*, 44 Wash. 361, 87 Pac. 498.

So far as the record in this case shows, neither party has any interest in the lots. The plaintiff does not claim to have acquired title or right of possession from the state. It is a well-settled rule in this state that, in actions in ejectment, the plaintiff must recover upon the strength of his own title, not upon the weakness of his adversary. *Humphries v. Sorenson*, 33 Wash. 563, 74 Pac. 690; *George v. Columbia etc. R. Co.*, 38 Wash. 480, 80 Pac. 767; *Helm v. Johnson*, 40 Wash. 420, 82 Pac. 402. Respondent seeks to avoid this rule in this case by asserting that;

"Ejectment may be maintained upon the prior possession of plaintiff, or of parties through whom he claims, such possession being a sufficient *prima facie* title." 15 Cyc. 30.

But this rule is not applicable to this case, because it is not shown that the plaintiff had prior possession. The evidence shows, and the court found, that plaintiff's grantor had never been in possession, and that defendants were in possession of the greater portion of the lots at the time plaintiff obtained the deed from Frater, and that defendants have maintained such possession ever since. It is true the court found that, after plaintiff had purchased the interest of Frater, receiver, defendants obtained permission from plaintiff to occupy the lots as they had been occupying them theretofore. The evidence is conflicting upon this point, and it is not clear to us that this finding is correct, but assuming it to be correct, we think it is not sufficient to show a tenancy by the defendants under the plaintiff. It is conceded that defendants paid no rent and that they maintained possession continuously for about eighteen years. It is not shown that the plaintiff's position was changed in any way by granting permission to defendants to occupy the premises. But if this granting permission to occupy the premises were alone sufficient to show a tenancy and holding under the plaintiff, the plaintiff might,

Feb. 1908]

Syllabus.

in that event, have maintained an action for unlawful detainer. Such, however, was not the remedy pursued. The complaint alleged title in the plaintiff, and right of possession for that reason. The plaintiff must stand or fall upon the allegations of his complaint. As we have already seen, the plaintiff failed to show title in himself, but showed that it has no interest in the property for the reason that the title is in the state. It is true the plaintiff has paid taxes on the lots since the year 1899, but this fact does not show title as against the state. Bal. Code, § 5505 (P. C. § 1162).

We are satisfied from the evidence and the findings of the court that neither party to this action has title to the lands in question, nor the right of possession, and therefore cannot maintain ejectment against the other. The judgment must therefore be reversed, and the action dismissed.

HADLEY, C. J., CROW, and DUNBAR, JJ., concur.

ROOT, J., concurs in the result.

RUDKIN and FULLERTON, JJ., took no part.

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[No. 7012. Decided February 28, 1908.]

CLAUDE BRIGGS *et al.*, *Appellants*, v. P. A. BOUNDS,  
*Respondent*.<sup>1</sup>

FRAUDS, STATUTE OF—BROKERS—EMPLOYMENT—ORAL CONTRACT—SUFFICIENCY. Under Laws 1905, p. 110, requiring a contract with a broker for commissions on the sale of real estate, or a memorandum thereof, to be in writing, an oral contract of employment for the sale of land at a stated compensation is void as within the statute of frauds.

SAME—PERFORMANCE—EFFECT. Where a statute requires a contract for the employment of a broker, or a memorandum thereof, to

<sup>1</sup>Reported in 94 Pac. 101.

be in writing, full performance of an oral contract will not take the same out of the operation of the statute or authorize a recovery upon a *quantum meruit*.

Appeal from a judgment of the superior court for Yakima county, Rigg, J., entered March 29, 1907, upon sustaining a demurrer to the complaint, dismissing an action to recover a commission on the sale of real property. Affirmed.

*Snyder & Luse*, for appellants.

Root, J.—This was an action brought by appellants to recover from respondent a commission for finding a purchaser for certain real estate. From a judgment of dismissal, this appeal is prosecuted.

The complaint alleges that defendant entered into an oral contract with plaintiffs, whereby the latter agreed that they would use their best endeavors to find a purchaser for defendant's property at a mentioned price, and that he agreed to pay them for said services the sum of \$800. To this complaint a demurrer was interposed by defendant and sustained by the trial court. Plaintiff electing to stand upon their complaint, the action was dismissed, and this appeal taken.

The trial court evidently sustained the demurrer by reason of chap. 58, Laws 1905, page 110, which amended Bal. Code, § 4576 (P. C. § 5343), and so far as applicable to this case reads as follows:

"In the following cases, specified in this section, any agreement, contract and promise shall be void, unless such agreement, contract, or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, that is to say: . . . (5) An agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission."

The effect of this statute upon oral contracts of the character here involved is set forth in the case of *Keith v. Smith*,

Feb. 1908]

Statement of Case.

46 Wash. 131, 89 Pac. 473. The decision in that case is conclusive of this, and upon the authority thereof the judgment of the trial court is hereby affirmed.

HADLEY, C. J., FULLERTON, MOUNT, CROW, and DUNBAR, JJ., concur.

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[No. 7063. Decided February 28, 1908.]

FRANK A. HOFF, *Respondent*, v. JAPANESE-AMERICAN  
FERTILIZER & FISHERIES COMPANY, *Appellant*.<sup>1</sup>

MASTER AND SERVANT—ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY. Whether risks were assumed as incident to the employment, and whether plaintiff was guilty of contributory negligence, are questions for the jury, where it appears that a fireman, while about to put wood on the fire, stepped back into a five-inch depression in the floor, causing his foot to come in contact with a pinch wheel, where it appears that the place was somewhat dark, that the wheel was protected by a much worn coaming which was insufficient to prevent contact with the wheel, and that plaintiff had been in the place but a few times and had not been warned, although he could have seen the wheel, the evidence as to the defenses being somewhat contradictory.

APPEAL—HARMLESS ERROR—TRIAL—INSTRUCTIONS. An instruction, erroneous as an abstract proposition of law, is not ground for reversal, where taken with all the other instructions, it was not erroneous under the facts and not capable of prejudicing the appellant.

Appeal from a judgment of the superior court for King county, Morris, J., entered April 26, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries. Affirmed.

*F. S. Blattner* and *F. H. Kelley*, for appellant.

*Jay C. Allen*, for respondent.

<sup>1</sup>Reported in 94 Pac. 109.

Root, J.—Plaintiff brought this action to recover damages caused by having his foot injured by the machinery on a tug boat, upon which he was employed as a deck hand and as an assistant at times to the fireman. From a judgment in plaintiff's favor, the defendant appeals.

It was part of respondent's duty to attend to the fires while the fireman was at his meals. In order to put wood upon the fire it was necessary for him to climb into the fire room, which was in a space between the boiler and the engine. Its depth from the deck is about five feet, and it is lighted from a window on each side. The bottom or floor of this hole was, however, somewhat dark. On about a level with the floor, at one side, was a pinch wheel about ten inches in diameter, connected with an "eccentric" and running partly in a well or depression the bottom of which was about five inches below the level of the floor. This well was protected by a coaming made of boards an inch thick, which had become much worn by use and insufficient to keep one's foot from coming in contact with the wheel. Plaintiff had been in this place but a few times prior to the occasion of his injury. He had not been warned of the danger and claimed not to know thereof, although he had seen, or could have seen, the wheel. At the time in question he was about to put some wood upon the fire, when he stepped back and his left foot came in contact with the revolving pinch wheel and eccentric, and he was severely injured.

It was urged by appellant that respondent knew of the presence of this wheel and eccentric and the danger to be apprehended therefrom, and that this danger was incident to his employment, and that he was also guilty of contributory negligence. These are affirmative defenses and must be established by a preponderance of the evidence in order to be available. The evidence, in so far as it was applicable to either of these defenses, was somewhat contradictory, and such that reasonable men might draw different inferences therefrom. There was some evidence and some permissible inferences which would

Feb. 1908]

Opinion Per Roor, J.

go to sustain these defenses. On the other hand, there was substantial evidence calculated to defeat them. This being true, the question of whether either or both were established by the evidence became one for the jury, and we cannot say, in the light of this record, that its conclusion was erroneous. We cannot say that the danger was so open and apparent as to charge respondent, as a matter of law, with having assumed the risk. Neither is the evidence sufficient, as a matter of law, to hold him guilty of contributory negligence.

Appellant questions the correctness of an instruction given by the trial court relative to temporary forgetfulness of an employee by reason of which he meets an injury. It is possible that the instruction complained of might be erroneous as an abstract proposition of law, or in a case where the circumstances were different from those here found. But taken together with all the other instructions given in this case, we think that it was not erroneous under the facts of the case, and not capable of prejudicing the rights of appellant. Certain instructions were requested by appellant and refused by the court, and such refusal is assigned as error. We have carefully examined these and think that no error was committed by the refusal.

Error is also assigned upon the ruling of the trial court in permitting the master of the vessel to testify as to the reasonable safety of the place where respondent was working. We do not think this was error.

The judgment is affirmed.

HADLEY, C. J., FULLERTON, MOUNT, CROW, and DUNBAR, JJ., concur.

[No. 7105. Decided February 28, 1908.]

CLAYTON T. EAID, *Appellant*, v. THOMAS CONNOLLY *et al.*,  
*Respondents*.<sup>1</sup>

EXECUTION—WRONGFUL SALE—CONSPIRACY TO DEFRAUD—EVIDENCE—SUFFICIENCY. The fact that, at an execution sale, the purchaser did not pay the sheriff until four days thereafter, or that the execution debtor claims that he was not served with process in the action (although liable for the indebtedness and having notice of the action brought against him and others as partners), does not constitute proof of fraud in the sale or support an action for wrongful execution or conspiracy to defraud.

JUSTICE OF THE PEACE—RIGHT TO OFFICE—NEW TRIAL—QUESTIONS CONSIDERED. The right of a justice of the peace who rendered a judgment to hold his office cannot be questioned by a motion for a new trial, and an attempted accompanying *quo warranto* proceeding, in an action for damages and wrongful execution of the justice's judgment.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered June 25, 1907, upon granting a nonsuit, after a trial on the merits before the court and a jury, dismissing an action for conspiracy. Affirmed.

*Geo. L. Houghton*, for appellant.

*Vance & Mitchell*, for respondents.

ROOT, J.—This was an action for damages alleged to have been caused to plaintiff by the action of defendants, wherein and whereby they “conspired and colluded together to cheat, defraud, annoy, and to injure the business reputation of plaintiff, and did actually seize and convert to their own use contrary to law” certain property belonging to plaintiff and used and contained in his restaurant in Olympia. From a judgment of nonsuit and dismissal, plaintiff appeals to this court.

From the exhibits and other evidence offered, some of which were received and some of which were rejected, it appears that

<sup>1</sup>Reported in 94 Pac. 188.

Feb. 1908]

Opinion Per Root, J.

the property in question was levied upon and sold by the respondent sheriff under a judgment obtained against appellant in the justice court of Thurston county, for Olympia precinct, presided over by Robert Frost, Esquire, from which judgment plaintiff had sought to appeal, but his appeal was dismissed. No suggestion of any of these matters occurs in any of the pleadings herein. Upon the trial of this case in the superior court, no evidence was introduced or offered showing, or tending to show, any fraud or collusion or conspiracy on the part of these respondents or of any of them. The only evidence which appellant now claims to indicate any such fraud, collusion, or conspiracy is that respondent Mitchell, who purchased the property at the execution sale, did not hand the sheriff the money in payment therefor until four days thereafter, and the day of the payment was a holiday. How it can be thought that these facts constitute any evidence of fraud, collusion, or conspiracy we are unable to perceive.

Appellant urges, that he was not the owner of the restaurant at the time the indebtedness was incurred for which the judgment in the justice court was obtained; that he and two others had purchased the property, but he, being unable to advance his share of the money, did not become a partner in the business, although he worked in the restaurant during the time the indebtedness was incurred; that thereafter the man who was operating the restaurant sold it to appellant, who agreed to pay the bills, but was not served with summons and complaint in the suit in the justice court, although he admits that he knew there was an action pending when he made the purchase, as he claims, from the man with whom he had intended to be a partner. It is doubtful whether there was anything in the pleadings that would in any manner justify the trial court in going into any of these matters. But assuming that there was, it is clear from an examination of the evidence, considering both what was introduced and what was offered, that there was nothing that would authorize the trial court to

submit the case to the jury. Appellant's own testimony was sufficient to defeat his case.

A motion for new trial was interposed by appellant, the principal, or at least a prominent feature thereof being an assertion that Frost was not legally a justice of the peace at the time he rendered the judgment, and that the same was therefore void; that the city of Olympia, at the time of the election of said Frost, had a population of over five thousand and could consequently have but one justice of the peace, and that as there were two in Olympia it followed that said Frost was not authorized to act; and an attempt was made to interject a *quo warranto* proceeding in connection with the motion for a new trial. This proceeding was unique. We are not pointed to any precedent justifying it. Nothing whatever was said in the complaint as to any lack of jurisdiction on the part of Justice Frost. The jurisdiction of the justice court or justice of the peace cannot be questioned in the indirect manner attempted by appellant.

Numerous assignments of error are made upon the rulings of the trial court touching the admission and exclusion of proffered evidence. We have examined these but find no error.

The judgment of the superior court is affirmed.

HADLEY, C. J., MOUNT, CROW, and DUNBAR, JJ., concur.

FULLERTON, J., concurs in the result.

Feb. 1908]

Opinion Per DUNBAR, J.

[No. 7132. Decided February 29, 1908.]

JOSEPH G. HEIM *et al.*, Respondents, v. MAX NEUBERT *et al.*,  
Appellants.<sup>1</sup>

BANKS AND BANKING—DRAFTS—LIABILITY OF CUSTOMER TO BANK. Where defendants, who were customers of plaintiffs' bank, purchased a New York draft that had been issued to J. C., but which had come into the possession of another person of the same name who claimed to be the payee and forged the payee's endorsement, and after warning as to their liability, endorsed the draft and advanced part of the sum to the forger, and left the draft for collection, and upon notice from New York that it had been paid, purchased another draft of the plaintiffs for the balance and sent it to the forger, and the latter draft came into the hands of an innocent purchaser for value, who recovered judgment thereon against the plaintiffs, who had stopped payment and defended at defendant's request, the equities of the case make the defendants liable over to the plaintiffs for the amount of the draft, the plaintiffs having given defendants prompt notice of the forgery of the first draft as soon as it was discovered; since there was no negligence or improper banking making plaintiffs' bank responsible to defendants for the amount of the draft.

Appeal from a judgment of the superior court for Pacific county, Reid, J., entered July 20, 1907, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action against the endorers of a bank draft. Affirmed.

*W. H. Abel*, for appellants.

*Sol. Smith* and *H. W. B. Hewen*, for respondents.

DUNBAR, J.—On December 4, 1904, a person, representing himself to be James Crosson, attempted to negotiate with the South Bend Banking Company a \$500 draft issued in favor of one James Crosson by the First National Bank of Grand Rapids, Michigan, upon the National Bank of Commerce of New York City. As it afterwards developed, the person

<sup>1</sup>Reported in 94 Pac. 104.

representing himself to be Crosson was not the Crosson to whom the draft was issued, and he is referred to in the brief of appellants as the "wrong" Crosson. The South Bend Banking Company refused to negotiate the draft, and Neubert & Cooper, the appellants in this action, who were customers of the South Bend Banking Company, went to the bank, claiming to be acquainted with Crosson, and endorsed his draft. Mr. Cooper, one of the firm, first went to the bank for this purpose and the cashier explained the responsibility of the endorsement to Mr. Cooper, who was inclined after such explanation to withdraw the endorsement, but did not do so. A short time afterwards Mr. Neubert, the other member of the appellant firm, returned to the bank, with the draft still bearing the endorsement, and desired the bank to purchase the draft. The same warning was given to Mr. Neubert by the cashier that was given to Mr. Cooper, but Mr. Neubert, acting for the firm of Neubert & Cooper, notwithstanding the doubts expressed by the cashier, purchased the draft and left it with the bank for collection, and the appellant firm was credited with the amount of the draft. On this question of the warning given by the cashier there is a conflict of testimony, but we are satisfied from the record that the statement of the cashier is correct. At this time \$100 was paid by the appellants to Crosson, and afterwards \$25 more, making \$125. Of this amount of money there is no question, the appellants admitting that they are liable therefor. The \$125 was charged to the account of Neubert & Cooper.

With the endorsement of Neubert & Cooper, the bank took the draft for collection for them and sent it to its correspondent in New York for that purpose. On the 22d day of December, 1906, the respondents received advice from New York that the draft had been paid, and immediately notified Neubert & Cooper, by telephone communication, of their advices from New York; whereupon Neubert & Cooper purchased a draft for \$375 on the National Bank of Commerce at Ta-

Feb. 1908]

Opinion Per DUNBAR, J.

coma, Washington, payable to the order of James Crosson, and forwarded the same to the payee at Seattle, Washington, and this draft is the subject-matter of the action. The payee of the draft, the wrong Crosson, sold it to Jamieson & McFarland, who turned it in to the bank with which they did business at Seattle, for collection from the drawee bank at Tacoma. On or about the 7th or 8th of January, 1905, respondents received word that the endorsement upon the New York draft was a forgery, and immediately communicated the fact to Neubert & Cooper. It seems that the draft had been properly issued to one James Crosson who lived in the city of Aberdeen, and had by some means come into the possession of the wrong J. Crosson, who assumed to be its owner. Suit was brought by Jamieson & McFarland of Seattle, who finally became *bona fide* holders for value, against the respondents in this action, to recover the \$375. Judgment was obtained against the respondents in that case and, on appeal, was affirmed by this court. *Jamieson & McFarland v. Heim*, 43 Wash. 153, 86 Pac. 165. The respondents paid the judgment, and bring this action against the appellants, the endorsers of the note, for the amount paid by them, with costs. We are convinced by the record, although there is some conflict in the testimony, that the former action was defended by the respondents at the instance and request of the appellants, who at that time recognized themselves as being responsible for his draft. In the present action judgment was found by the trial judge in favor of the respondents for the amount claimed.

This is an unusual case. It is not the ordinary case of a forgery of a draft or of the irresponsibility of the parties. The draft was properly paid by the correspondent of the respondents, but the money represented by the draft was paid to the wrong man. The findings of the lower court were set forth in the form of an opinion. This opinion of the court, it seems to us, covers the equity of the case, and we endorse it by

reproducing it here. After reviewing the facts in the case, the court said:

"The only question that bothers me so far as the plaintiffs are concerned is whether or not the bank was guilty of negligence or carelessness which resulted in getting Neubert into trouble in the way of taking that \$375 draft. On the other hand, the bank probably would never have heard anything in the ordinary course of business beyond what they already heard, that they had received credit. No doubt in the ordinary course of banking business they acted upon the information they had at the time, that they had received credit from their New York correspondent. Here was this endorsement of Neubert & Cooper on this commercial paper, and that should not be considered a light matter. Banks could scarcely be able to make collections for people if they could not rely upon these endorsements in cases of an unusual occurrence such as this here. Both the bank here and Neubert & Cooper were honest in their intentions in wanting to do what was right, and it is unfortunate that such occurrences as this can happen. But it does not seem to me that the bank should be compelled to suffer because it hardly can be called negligence or careless or improper banking for these people to do what they did, they having warned both these people about this draft, they apparently having had suspicion, warned both of the persons who signed it that they were liable to get into trouble, and certainly if it had not been endorsed by these people, if it hadn't been for their anxiety the bank would not have anything to do with it at all. It is only by reason of the fact of these endorsements and the insistence more or less of Neubert that the bank did take the draft for collection. They acted upon the advice of their correspondent that they had received credit for it. It does not appear affirmatively that they did actually tell either Neubert or Cooper that the thing had actually been paid. There is no testimony contradicting the cashier as to what he told Neubert, and in view of the fact that he was acting with circumspection himself and had warned these people about this draft, I think that it is not justice to hold the bank liable to suffer this loss."

We think the claim by the appellants that a settlement was made between these parties, that the appellants should be re-

Feb. 1908]

Opinion Per DUNBAR, J.

sponsible for only \$125, is not sustained by the record. Under the undisputed testimony the bank had refused to deal with Crosson under any circumstances, and all the transactions had were with the appellants, who bought the draft of Crosson and who were credited with the amount of the draft by the bank and charged back with the amount that the appellants drew out as payments to Crosson. In the ordinary course of business it would probably not have been the duty of the bank to have notified the appellants that the draft had been honored. Banks act upon the presumption that drafts are valid when they take them for collection and give credit to the depositors for the amount of the draft, subject to a charge back if the draft is found to be worthless. Ordinarily no notification is made. But in this instance, by reason of the communications had between the bank and these appellants, the bank knew that the appellants were owing to Crosson the amount of \$375 on the draft, and that they were anxious to send it to him, having his address, and notified them purely as a matter of accommodation.

Under all the circumstances of the case, we think it would be inequitable to hold the bank responsible for the amount of the draft, and the judgment of the lower court is therefore affirmed.

HADLEY, C. J., CROW, MOUNT, and ROOT, JJ., concur.

[No. 7140. Decided February 29, 1908.]

MORAN BROTHERS COMPANY, *Respondent*, v. PACIFIC COAST  
CASUALTY COMPANY, *Appellant*.<sup>1</sup>

INSURANCE—INDEMNITY—POLICY—NOTICE OF INJURY—RELEASE OF INSURER—TRUTH OF FACTS STATED. In an action upon an indemnity policy against liability for personal injuries to a servant, which required the insured to give full particulars of any claim, the company is not released by the fact that notice of claim upon a form furnished by the company (allowing only short spaces for answers to printed questions) stated briefly that the servant was injured by his own negligence in putting up scaffolding, when the fact was that defendant's carpenters erected the same, where the statements were made in good faith; since a more full statement and warranties of the answers were not intended.

EVIDENCE—PAROL—WRITTEN INSTRUMENT. A written release of two causes of action for personal injuries, for the expressed consideration of \$2,000, without reciting how much was paid in settlement of either claim, is not varied or contradicted by parol evidence that the whole sum was paid in settlement of the second cause of action, and that the first was of a trifling nature and ill founded; which evidence is therefore admissible.

Appeal from a judgment of the superior court for King county, Griffin, J., entered April 30, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on a policy of indemnity insurance. Affirmed.

*George E. de Steiguer*, for appellant.

*L. C. Gilman and Wright & Kelleher*, for respondent.

DUNBAR, J.—This action was brought upon a liability policy, plaintiff seeking to recover \$2,000, together with attorney's fees, on account of a claim for personal injuries paid by the plaintiff. About February 1, 1905, the defendant issued to the plaintiff three employers' liability policies. One,

<sup>1</sup>Reported in 94 Pac. 106.

No. 2715, is the one with which we have to deal in this case. This policy contained general and special agreements. The first was as follows:

"The assured, upon the occurrence of an accident, shall give immediate written notice thereof, with fullest particulars obtainable, to the home office of the company, or to its duly authorized agent in the locality in which this policy is issued. He shall give like notice with full particulars of any claim that may be made on account of such accident, and shall at all times render to the company all cooperation and assistance in his power."

The third recited: "The assured shall not settle any claim except at his own cost, . . ." With the view we take of what was proven in this case, it is not necessary to set forth the other provisions.

On the 18th of March, 1905, and while the policy was in force, a man named Edward Brown was injured while working on the battleship Nebraska, a work which was being prosecuted by Moran Brothers Company, respondent here. The plaintiff was carrying a policy of indemnity insurance with the Pennsylvania Indemnity Company. After the suit was commenced by Brown against the plaintiff, the defendant, represented by Mr. Peters, and the Pennsylvania Indemnity Company, represented by Mr. Eskridge, undertook the defense. A few days before the trial, Mr. Peters went to the shop of the plaintiff and personally investigated the facts and interviewed the witnesses. A report was promptly sent to the defendant, signed by one Forsyth, timekeeper for the plaintiff. The accident was caused by the collapse of a scaffold or staging. The report, among other things, contained the following statement:

"(16) Was accident due in whole or in part to want of care on part of injured person; if so, how? A. Due to his own fault. Brown and the man he was working with put up the staging themselves. (17) Did injured person know of the danger to which he was exposing himself? A. Fully. (18) Was accident due to negligence on part of any other person?

A. Yes. Thomas Smith. (19) If so, how? A. Smith and Brown put up staging without waiting for carpenters. (27) Was injury caused by violation of rules? A. Yes. Should not have built staging. (28) Was injury caused by any defect in any tool or machinery? A. Due to faulty construction of staging."

Brown instituted his action against Moran Brothers Company to recover on two causes of action. The first cause of action was for damages alleged to have been sustained prior to the time that the Moran Brothers Company had been insured by the defendant. By his second cause of action he sought to recover \$10,000 from Moran Brothers Company on account of the injury inflicted on March 18, 1905. It developed that the staging had not been made by Brown or the man who was working with him, but that it had been erected by the carpenters of the plaintiff. When the defendant became aware of this fact, it withdrew from the defense of the case, and plaintiff employed Mr. Peters to continue in the defense on the plaintiff's account. Thereafter negotiations were had after settling the case, and the plaintiff secured from the defendant a written consent to a settlement as follows:

"Seattle, Washington, November 22, 1905.

"Moran Bros. Company, Seattle, Wash.

"Gentlemen: Referring to the case of E. D. Brown against your company, claiming damages for injuries received by reason of an accident on March 18, 1905, resulting in a broken leg and other personal injuries, while refusing to accept any liability under our policy to indemnify you in this case for the reasons already stated to you, we do not wish to prejudice you in any contemplated settlement of the case, and therefore consent to a settlement of the case with the plaintiff on such terms as you deem best. And we agree that such settlement of case and release by the plaintiff shall entitle you to the same right of action against us as if the amount paid in settlement had been paid by you in satisfaction of final judgment in favor of the plaintiff against you.

"Yours truly, (Signed) Pacific Coast Casualty Co.,

"By E. F. Green, President."

The negotiations for settlement were conducted on behalf of the defendant by Mr. Eskridge. A written stipulation was entered into for the settlement of the case, the sum of \$2,000 was paid by the plaintiff to Brown's attorney, a release secured, and judgment of dismissal entered in the case brought by Brown. The stipulation and the release both provided clearly that the sum of \$2,000 was paid to secure a release from both causes of action set up by Brown. Upon the trial of the cause the court found all the issues in favor of the plaintiff, and judgment was entered, from which this appeal is taken.

The findings of fact were excepted to, and it is alleged that the court erred in finding that the plaintiff had complied with, and performed, all the terms and conditions of the policy, in that the plaintiff failed to make fair report of the accident and failed to keep books of account, or any account, or other means of ascertaining the different lines of pay roll on which premiums could be estimated; in admitting parol evidence to vary the effect of the written consent to the release given by the defendant and to vary the effect of the settlement made between Brown and the plaintiff; in finding that \$2,000, or that any specific sum whatsoever, was paid in settlement of the claim by Brown on account of the accident which occurred while defendant's policy was in force; in finding that the amount of premium due on the policy sued upon was only \$297.57; in finding that the full amount of premium due on this policy had been paid; in finding that such amount or any amount was settled by the plaintiff and defendant as the full amount of the premium earned, and in finding that Brown was a workman in the class covered by the policy sued upon.

The first contention is that the report of the accident did not comply with the first general agreement of the policy. It is not contended that the notice was not given in time, but it is contended that the facts as stated in the notice given were not true, especially with relation to the building of the staging or scaffolding; that, if the staging or scaffolding was put up

by the servants of the respondent, the company had a right to know that fact, and know it from the report sent it by the respondent; that liability insurance is based upon the obligation of the insured to give a correct report of the accident and its causes, insofar as it can be done. The report was made upon a blank form with printed questions furnished by the insurance company. An examination of this form shows that it was not in contemplation that any particularized statement should be made in the report, for the reason that one question crowds so closely upon another that there is no space for any but a most concise and brief reply to the questions asked. We think the essential object of this report is to give the company notice, and notice at once, of the character of the injury and the probability of liability, and it is not intended that any mistake which the employer might make in giving his version of the facts would render the policy ineffectual. It certainly is not intended that the answers should be as explicit and certain as an answer to the complaint in the case, or should constitute to the insurance company a warranty that the facts reported could be substantiated at the trial. In this instance it seems to us that the respondent has complied, in good faith, with the provisions in relation to the notice, and that the insurance company was not warranted in withdrawing from the defense to the action simply because it eventuated that the employer was not able to prove all the statements made in the brief report. The contention that the respondent failed to keep books of account, or any accounts, or other means of ascertaining the different lines of pay rolls on which premiums could be estimated, is not sustained by the testimony.

The next contention is that the court erred in permitting parol evidence to vary the effect of the written consent to the release given by the appellant, and to vary the effect of the settlement made between Brown and the respondent. The respondent introduced attorney Peters, who testified that he had

told Mr. Green, the president of the appellant, that he could not settle one cause of action without the other, and also stated that the \$2,000 had to be paid to settle the second cause of action; stating to him that the Brown case was one that ought to be settled, and that the best settlement he could get was for the sum of \$2,000; that he had tried to settle the second cause of action separately from the first, but that Brown would not settle the second cause of action for any less amount than he would take for the whole case; that the first cause of action was of a trifling nature, and that he did not think it could be sustained, and that a nonsuit would have to be granted, and that the whole \$2,000 would have to be paid in settlement of the second cause of action; that the plea of assumed risk on the part of Brown would undoubtedly be maintained so far as the first cause of action was concerned; that there would doubtless be a judgment against the defendant on the second cause of action, and that he advised Mr. Green that the \$2,000 in settlement of the suit should be paid. This testimony was direct. The question was asked: "Now, I will ask you whether you stated to Mr. Green that this \$2,000 had to be paid to settle the second cause of action. Answer: I did." And the attorney proceeded to state that he obtained the settlement for the sum of \$2,000, and that the stipulation of dismissal was entered.

The written instrument, the terms of which appellant claims were varied by this parol testimony, was the release by Brown which in effect released the Moran Brothers Company from all claims of any kind existing in Brown's favor and against the Moran Brothers Company from the creation of the world down to the present time, for the sum of \$2,000. The consent of the Pacific Coast Casualty Company we have set out above. The rule that the terms of a written instrument cannot be varied by parol testimony cannot be gainsaid, and it is well established that all prior contracts are merged in the written agreement, and that such agreement is a final reposi-

tory and evidence of the mutual obligation. But it is just as well established that parol testimony is admissible to explain written contracts when there is anything doubtful in the language used, or to supply omissions, or to prove agreements between the parties which were not merged in the contract though they might have relation to the same subject-matter. It is the province of the court to determine, both from the written contract and from oral testimony, the intent of the parties in relation to what was incorporated in the written agreement.

"This intent," says Mr. Wigmore in his book on Evidence, § 2430, "must be sought where always intent must be sought, namely, in the conduct and language of the parties and the surrounding circumstances. The document alone will not suffice. What it was intended to cover cannot be known until we know what there was to cover. The question being whether certain subjects of negotiation were intended to be covered, we must compare the writing and the negotiations before we can determine whether they were in fact covered. Thus the apparent paradox is committed of receiving proof of certain negotiations in order to determine whether to exclude them; and this doubtless has sometimes seemed to lower the rule to a quibble. But the paradox is apparent only. The explanation is that those alleged negotiations are received only provisionally. Although in form the witnesses may be allowed to recite the facts, yet in truth the facts will be afterwards treated as immaterial and legally void, if the rule is held applicable."

It will be noticed that this written agreement between the parties does not state the amount to be paid in settlement of the Brown claim, or for what cause of action it was to be paid. On this subject the written instrument is silent, and therefore it was proper and necessary in the interest of justice to admit testimony to show that the agreement was that the whole amount of the \$2,000 was paid in settlement of the second cause of action, and that the admission of such testimony did not therefore controvert the general rule. An examination of the record convinces us that the finding of the court in

Mar. 1908]

Citations of Counsel.

relation to the amount of premium due on the policy sued upon, and finding that Brown was in the class sued upon, was justified.

Finding no error in the record, the judgment is affirmed.

HADLEY, C. J., CROW, MOUNT, ROOT, and FULLERTON, JJ., concur.

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[No. 6921. Decided March 4, 1908.]

THE CITY OF SEATTLE, *Appellant*, v. SEATTLE ELECTRIC  
COMPANY, *Respondent*.<sup>1</sup>

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—ASSESSMENTS—PROPERTY LIABLE—STREET RAILWAY FRANCHISES. Under Bal. Code, § 796, authorizing the assessment of lots, blocks or parcels of land that may be benefited by a municipal improvement, a street railway company's right of way and trackage upon a street, cannot be assessed where it did not own the fee in the street, but only held a franchise for its use for a limited time.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered March 7, 1907, after a hearing on the merits, vacating an assessment made by commissioners appointed to levy an assessment upon property specially benefited by a municipal improvement. Affirmed.

*Scott Calhoun* and *Elmer E. Todd*, for appellant, cited: *In re Westlake Avenue*, 40 Wash. 144, 82 Pac. 279; *Chicago City R. Co. v. Chicago*, 90 Ill. 573, 32 Am. Rep. 54; *Chicago v. Cummings*, 144 Ill. 446, 33 N. E. 34; *Rich v. Chicago*, 152 Ill. 18, 38 N. E. 255; *Cicero & Proviso Street R. Co. v. Chicago*, 176 Ill. 501, 52 N. E. 866; *Little v. Chicago etc. R. Co.*, 46 Ill. App. 534; *Appeal of North Beach & Mission R. Co.*, 32 Cal. 499; *New Haven v. Fair Haven etc. R. Co.*, 38 Conn. 422, 9 Am. Rep. 399.

<sup>1</sup>Reported in 94 Pac. 194.

*James B. Howe and Hugh A. Tait*, for respondent, to the point that the franchise and right of way or trackage cannot be assessed, cited: *Commercial Elec. L. & P. Co. v. Judson*, 21 Wash. 49, 56 Pac. 829, 57 L. R. A. 78; *Front St. Cable R. Co. v. Johnson*, 2 Wash. 112, 25 Pac. 1084, 11 L. R. A. 693; *State v. District Court*, 31 Minn. 354, 17 N. W. 954; *Lake Shore etc. R. Co. v. Grand Rapids*, 102 Mich. 37, 60 N. W. 767; *Chicago etc. R. Co. v. Ottumwa*, 112 Iowa 300, 83 N. W. 1074, 51 L. R. A. 763; *Philadelphia v. Philadelphia etc. R. Co.*, 33 Pa. St. 41; *Farmers' Loan & Trust Co. v. Ansonia*, 61 Conn. 76, 23 Atl. 705; *Koons v. Lucas*, 52 Iowa 177, 3 N. W. 84; *City of Muscatine v. Chicago etc. R. Co.*, 88 Iowa 291, 55 N. W. 100; *King v. Duryea*, 45 N. J. L. 258; *Oshkosh City R. Co. v. Winnebago County*, 89 Wis. 435, 61 N. W. 1107; *People ex rel. James v. Gilon*, 126 N. Y. 640, 27 N. E. 285; *Lorain Steel Co. v. Norfolk etc. R. Co.*, 187 Mass. 500, 73 N. E. 646.

FULLERTON, J.—The city of Seattle, pursuant to powers conferred on it by its charter and by the general laws, caused all that portion of Westlake avenue lying between Denny way and Mercer street to be widened and otherwise improved. The respondent, Seattle Electric Company, owns and operates an electric railway on certain streets of the city of Seattle, among which is Westlake avenue, under a franchise granted by the city to J. D. Lowman and Jacob Furth, of whom it is the successor in interest. The track on the improved part of Westlake avenue extends in both directions beyond such part, and such track is but a small portion of one general system of street railway operated by the respondent under the franchise above mentioned. The ordinance under which the improvement was made provided that the improvement should be paid for in part by an assessment on the property benefited thereby, and to that end commissioners were duly appointed to apportion the part assessed to the property be-

Mar. 1908]

Opinion Per FULLERTON, J.

tween each several lot, block, tract, and parcel of land in the proportion in which they found each to be severally benefited. The commissioners so appointed made up an assessment roll as directed, in which they returned as property specially benefited the respondent's "right of way and trackage upon Westlake avenue between Denny way and Mercer street," assessing thereon the sum of \$2,500. To the report of the commissioners, the respondent filed objections in writing, contending that the assessment insofar as it sought to impose a charge upon its right of way and track to pay the costs of the street improvement was contrary to law and void, and moved that such assessment be set aside and vacated. On the hearing the court sustained the objections and made the orders moved for, further ordering that the amount of the assessment which the commissioners had sought to charge on the property of the respondent be paid by the city out of its general fund. The city appeals.

The section of the statute conferring authority upon the commissioners to make the assessment and the section under which they proceeded in making the assessment, reads as follows:

"It shall be the duty of such commissioners to examine the locality where the improvement is proposed to be made, and the lots, blocks, tracts and parcels of land that will be specially benefited thereby, and to estimate what proportion of the total cost of such improvements will be of benefit to the public and what proportion thereof will be of benefit to the property to be benefited, and apportion the same between the city and such property, so that each shall bear its relative equitable proportion; and having found said amounts to apportion and assess the amount so found to be of benefit to the property upon the several lots, blocks, tracts, and parcels of land in the proportion in which they will be severally benefited by such improvement: *Provided*, That no lot, block, tract, or parcel of land shall be assessed a greater amount than it will be actually benefited, nor shall any lot, block, tract, or parcel of land which shall have been found by the jury or court to be damaged be assessed for any benefits: *And provided further*, That

it shall not be necessary for said commissioners to examine the locality excepting where the ordinance provides for the establishment, opening, widening or improvement of streets, avenues, alleys or highways. Such part of the compensation, damages and costs as is not finally assessed against property benefited shall be paid from any general funds of the city or town applicable thereto." Bal. Code, § 796 (P. C. § 5070).

A reading of this section makes it at once apparent that the commissioners are authorized to assess only lots, blocks, tracts and parcels of land specially benefited to pay the costs of a street improvement, and unless the respondent's interests in this street can be held to be one or the other of these there is no authority for the charge the commissioners sought to impose upon it. It seems to us that it cannot be so held. The respondent's right in the street is in no sense a lot, block, tract, or parcel of land. It does not own the fee of the street over which its tracks are laid and its cars operated, nor does it have dominion or control over that portion of the street. On the contrary, the fee of the street rests in the abutting property holders, to whom it will revert when the interests of the public therein cease from any cause, and dominion and control over it is vested in the public authorities in whom it will remain as long as the street retains its public character. The respondent's rights therein are such and only such as these public authorities have conferred, and are, roughly speaking, the right to construct and maintain for a limited time a railway track on a fixed portion of the street, and the right to operate cars on such track for the purpose of carrying passengers and freight for hire. This does not constitute either a lot, block, tract or parcel of land, nor does it constitute an interest in land as that term is ordinarily understood, it is an easement only, and as such is not assessable under a power to assess lots, blocks, tracts and parcels of land. Nor has the railway any such an easement in the street that a specific portion of it can be benefited in such a way as to warrant a special assessment on that particular part of its easement. Doubtless

Mar. 1908]

Opinion Per FULLERTON, J.

to lessen the grade of a street would benefit the railway company inasmuch as the lessened grade would enable it to carry its load with a less expenditure of power than the heavier grade required, and to widen the street would doubtless benefit it, as it would tend to prevent congestion of the street and thus permit of a freer movement of its cars, enabling the company to carry its load with a lesser equipment in the way of rolling stock and with a less number of employees than the narrower street required. But these are not specific benefits to a particular part of the road; they are general benefits inuring to the entire system, and for which the system itself, not a small fraction thereof, should be made responsible.

The fact, furthermore, that the cost of the benefit was not made a charge on the entire system is evidence of the fact that the legislature did not have street railways in mind when it enacted the law relating to special assessments. Had it had them in mind it is not to be doubted that it would have provided some rational means of collecting the assessment when made. If the city's contention be correct, the legislature provided for the enforcement of the assessment, not by making the charge a lien against the entire road, but by making it a charge on that portion of the road only which passes over the improved street, be the same ten blocks in length, as in this instance, or only the length of an ordinary car, as it might be in another case, and confined the power to collect to a sale of that specific part. This, it will be seen, could result in dividing the street car system into many small independent parts, the one part operated without regard to the other, practically nullifying its primary purpose, namely, the speedy transportation of passengers from one part of the city to another.

But it is said our statute is adopted from the statute of Illinois, and that the courts of that state had, prior to its adoption by this state, construed it as empowering municipalities to impose a part of the burden of improving the streets

upon the street car companies. It is true, as we said in the case of *In Re Westlake Avenue*, 40 Wash. 144, 82 Pac. 279, that the statute was borrowed almost literally from that state, and insofar as its provisions were in question in that case, the statement was correct and the deduction drawn from the fact applicable. But the Illinois statute makes the assessment a liability against the person owning the property assessed and provides that judgment may be taken against such owner as upon a personal debt on which execution may issue against all of his property, personal as well as real. This provision has the effect of making the tax a lien upon the entire property of a street car company, and prevents its dissolution by sale in minor parts. This part of the statute of Illinois was not adopted by our legislature, and we think the failure to so adopt it precludes the idea that they intended to adopt the construction put upon it by the courts of that state, since such construction must have been influenced largely if not entirely by this provision.

The case of *Northern Pac. R. Co. v. Seattle*, 46 Wash. 674, 91 Pac. 244, is not in point here. The right of way in that case abutted upon the street, it was no part of the street itself and was not an additional burden upon the street. The right of way and track was also the private property of the railroad company in the sense that the company alone had the use of and control over it, while in this case the general public still have the use and do use the entire street. The right of way in that case was perpetual, while here it is for only a limited time. The land in that case was to all intents and purposes the railway company's property, while here the fee as well as the right of control belong to others. Other differences between the cases will readily occur to the mind, but these are sufficient to show the want of similarity between them.

The authorities from other states are collected in the briefs of counsel. They are not uniform even under similar or like

statutes, but we think the better reason, as well as the weight of authority, is with the conclusion adopted by the trial court. The judgment appealed from will therefore be affirmed.

RUDKIN, MOUNT, and DUNBAR, JJ., concur.

ROOT, J., dissents.

HADLEY, C. J. and CROW, J., took no part.

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[No. 6956. Decided March 4, 1908.]

**THE STATE OF WASHINGTON, *on the Relation of University  
Lumber & Shingle Company, Plaintiff*, v. SAM H.  
NICHOLS, *Secretary of State, Respondent*.<sup>1</sup>**

CORPORATIONS—FOREIGN CORPORATIONS—RIGHT TO DO BUSINESS—ARTICLES—CONSTRUCTION—TRUST COMPANIES. Articles of a foreign corporation authorizing it "to act as agent in the sale and purchase of real and personal property" do not authorize it to do a trust business, and hence do not require compliance with the provisions relating to trust companies.

SAME—REAL ESTATE BROKERAGE BUSINESS—STATUTES—CONSTRUCTION. The proviso to Bal. Code, § 4291, prohibiting a foreign corporation which has among its powers the business of real estate brokerage from carrying on a brokerage business in this state, provides that the prohibition shall not extend to any other business for which it is organized; hence a manufacturing company authorized to do a brokerage business in its home state is entitled to file its articles and do other business in this state.

Application filed in the supreme court September 17, 1907, for a writ of mandamus directed to the secretary of state to compel the filing and recording of the articles of a foreign corporation. Writ granted.

*Geo. S. Shepherd*, for relator.

*The Attorney General, A. J. Falknor, Assistant, and R. G. Sharp*, for respondent.

<sup>1</sup>Reported in 94 Pac. 196.

MOUNT, J.—Relator is a corporation duly organized under the laws of Oregon to manufacture lumber and shingles. On the 29th day of April, 1907, it presented to respondent, as secretary of state, a duly certified copy of its articles of incorporation as filed in Oregon, together with an appointment of a resident agent in Washington, and tendered the legal fees for filing and recording the same. The secretary of state refused to file or record the articles for the reason that they contained the following clause:

“(8) To buy, own, lease, mortgage, sell, transfer, assign, exchange, convey and deal in all kinds of real and personal property, and acquire rights of way, charters, franchises, privileges, and subsidies in all parts of the United States, its possessions and Canada, and borrow money and pledge its property in payment of the same, and mortgage its assets to secure its liabilities, and to lend money, and to take, own, sell, buy, and assign evidences of indebtedness, notes and mortgages, and enforce the same, and to claim, file, and enforce liens for all sums owing to this corporation as it may be provided by law or assign the same and to do anything and everything necessary, proper, convenient, or expedient to carry on the objects and purposes incident to the business aforesaid and the exercise of its corporate functions.”

The relator makes application to this court for a writ to direct the respondent to file and record its articles. The powers of foreign corporations are set forth in Bal. Code, § 4291 (P. C. § 7214), being § 1, Laws 1890, page 288, as follows:

“Any corporation incorporated under the laws of any state or territory in the United States, or of any foreign country, state, or colony, for any of the purposes for which domestic corporations are authorized to be formed under the laws of this state, shall have full power, and is hereby authorized, to sue and to be sued in any court having competent jurisdiction, to acquire, purchase, hold, mortgage, sell, convey, or otherwise dispose of in the corporate name all real estate or personal property necessary or convenient to carry into effect the objects and purposes of its corporation, and also any interest in real estate, by mortgage or otherwise, due to or

loans made by such foreign corporations within the boundaries of this state, either prior to or after the passage of this act, and generally do and perform every act and transact every kind of business within this state, in the same manner and to the same extent as corporations incorporated and organized under the laws of this state are authorized to do under the laws of this state, by a compliance with all the conditions prescribed by the next two succeeding sections of this chapter."

The same section provides further that foreign corporations may not transact business on more favorable terms than domestic corporations. It further provides:

"That no foreign corporation which is hereafter organized which has among its powers the business of dealing in real estate, and buying and selling the same, and for the purpose of carrying on a real estate brokerage business, shall be permitted to transact such business of buying and selling and dealing in real estate, and carrying on a brokerage business therein, in this state; but this prohibition shall not extend to any other business for the transaction of which such corporation may be organized."

This last provision prohibits foreign corporations from doing a brokerage business in real estate and dealing in the same in this state, but clearly contemplates that such corporation may file its articles and engage in other business not prohibited.

In the case of *State ex rel. Amalgamated Republic Mines Co. v. Nichols*, 47 Wash. 117, 91 Pac. 632, and cases therein cited, this court denied writs because the corporations sought to file articles which authorized a trust business, while domestic corporations were prohibited from filing such articles. This we held would be giving more favorable terms to foreign corporations than were accorded corporations organized in the state. In the case at bar, however, no such attempt is made. The relator's powers do not extend to a trust business. The nearest approach to such business is contained in the clause: "To act as agent in the sale and purchase of real

and personal property." This, of course, means only that the corporation is authorized to do a "real estate brokerage business" in its home state, and not a trust business within the meaning of our statute. This seems to bring the case within the statutory exception that foreign corporations shall not carry on a real estate business "but this prohibition shall not extend to any other business for the transaction of which such corporation may be organized," and without the rule in *State ex rel. v. Nichols, supra*. It was evidently the intention of the legislature to permit foreign corporations to file articles and transact business not prohibited, especially where the articles of incorporation complied with the laws of this state and placed such foreign corporations on no more favorable terms than are required of domestic corporations.

We think the peremptory writ should issue in this case, and it is so ordered.

HADLEY, C. J., CROW, FULLERTON, and ROOT, JJ., concur.

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[No. 7112. Decided March 4, 1908.]

C. T. SYLLIAASEN *et al.*, *Appellants*, v. C. J. HANSON,  
*Respondent*.<sup>1</sup>

BROKERS — SALE OF LANDS — AUTHORITY — FRAUDS, STATUTE OF. Where the owners listed certain real estate with brokers, giving them the exclusive handling of the property for thirty days by a memorandum and conversation specifying the conditions on which they might sell the property or find a purchaser, whereby the owner agreed to notify the brokers at once in writing if the property was withdrawn from the market or sold, evidence is not admissible to show a usage and custom among brokers whereby the transaction was treated as authority to make a binding contract of sale, or to show that the owner had stated to a third person that the brokers had exclusive authority to sell for thirty days; since the memorandum did not purport to be a contract, nor give the brokers any right to enter into a contract of sale, and there was no clear and convincing proof of oral authority to make such a contract.

<sup>1</sup>Reported in 94 Pac. 187.

Mar. 1908]

Opinion Per Root, J.

Appeal from a judgment of the superior court for King county, Griffin, J., entered July 8, 1907, in favor of the defendant, dismissing an action for specific performance. Affirmed.

*S. S. Langland*, for appellants.

*C. E. Piper*, for respondent.

Root, J.—Plaintiffs instituted this action to compel specific performance by defendant of an alleged contract to sell certain real estate. From a judgment of dismissal plaintiffs appeal.

On June 1, 1906, F. M. Jordan & Co., real estate brokers, approached respondent with a proposition to list the property in question for sale with said firm. Respondent said he wished to sell the property, and agreed to comply with the request of said agents to let them have the exclusive handling of the same for a period of thirty days. A memorandum in writing was then filled out, containing various data as to the condition and description of the property and as to the terms upon which the brokers might sell the same or secure a purchaser therefor. There was no language in this memorandum directing or authorizing the brokers to sell the same or to secure a purchaser, and nothing was said therein about the brokers having any right to enter into a contract of sale or conveyance. The memorandum did not purport to be an agreement or contract. Below the data mentioned was the following:

“If property be sold or taken off the market, I agree to give notice in writing to F. M. Jordan.”

This was signed by respondent. On the 30th of June, Jordan & Co. secured a purchaser in the person of appellant C. T. Sylliaasen, who upon that date made a deposit of \$250 with Jordan & Co., and was ready and willing to pay the remainder of the sum for which respondent had agreed to sell

the property. The brokers, as agents, signed a receipt for this deposit, which receipt set forth the terms of the sale the same as specified in the memorandum heretofore mentioned, and notified respondent of this transaction with Sylliaasen, whereupon respondent refused to sell and convey the property. Appellant promptly tendered the full amount of the purchase money, but respondent refused to receive the same or to do anything toward carrying out the agreement which Jordan & Co. had made with appellant. Thereupon this action was brought to compel a conveyance.

Upon the trial, the court having intimated that the memorandum and the evidence as to the conversation between respondent and the brokers merely authorized the latter to secure a purchaser but did not authorize them to bind the respondent by any agreement for the sale and conveyance of the property, appellants offered evidence to prove the custom and usage of real estate brokers having instructions and memoranda such as the brokers had in this case. The trial court refused to admit such evidence, upon the ground that the memorandum and the conversation of respondent, as a matter of law, were incapable of being authority for binding the respondent to any agreement for the sale and conveyance of the property, and upon the further ground that there was no evidence that the respondent knew of any usage or custom on the part of real estate dealers that would tend to modify the legal effect of such conversation or memorandum. This ruling is assigned as error. Appellants also sought to show that during the thirty-day period during which Jordan & Co. held this memorandum and had the exclusive right of securing a purchaser for the property or making a sale thereof, one Lee went to see respondent about purchasing this property for appellants and was told by the respondent that Jordan & Co. had been given the exclusive right for thirty days to sell the same. The exclusion of this evidence is also assigned as error.

Under the facts as presented here, we do not think the ex-

Mar. 1908]

Opinion Per Root, J.

clusion of the evidence offered, in either instance mentioned, constituted error. We do not think that such evidence, if admitted, could have changed the legal effect of the authority given by respondent to Jordan & Co. as evidenced by the memorandum and respondent's conversation with the brokers when he authorized them to list the property. Neither do we think that this conversation and memorandum constituted authority for Jordan & Co. to bind respondent by any agreement for the sale and conveyance of the property. Ever since the case of *Carstens v. McReavy*, 1 Wash. 329, 25 Pac. 471, it has been the recognized law in this state that the ordinary power of a real estate broker to find a purchaser for real estate did not authorize him to execute a contract of sale or conveyance that could be enforced by an action for specific performance. It was held in the case of *Degginger v. Martin*, ante p. 1, 92 Pac. 674, that an owner might by parol authorize such a broker or agent to make a contract that would be binding and that could be so enforced. But in that case it was also said:

"Although we have thus held that, under the statute of frauds, an enforceable contract for the sale of real estate may be signed either by the party to be charged or by some other person by him thereunto duly authorized, and that the authority of such other person may be in parol, we are of the opinion that such oral authority should in all cases be sustained by clear and convincing proof, and the manifest preponderance of the evidence, especially where the alleged authority is denied by the vendor or party to be charged. A less strict requirement might tend to promote the particular frauds which the statute was intended to prevent."

In that case the owner had told her agent "to sell quick, take the money and close the deal." Nothing of this kind is shown to have occurred in this case, and certainly there is no "clear and convincing proof" and no "manifest preponderance of the evidence" establishing any intention on the part of the respondent to authorize the brokers to enter into a con-

tract binding respondent to sell and convey the property. See *Armstrong v. Oakley*, 23 Wash. 122, 62 Pac. 499; *Peirce v. Wheeler*, 44 Wash. 326, 87 Pac. 361.

The judgment of the superior court is affirmed.

HADLEY, C. J., FULLERTON, DUNBAR, MOUNT, and CROW, JJ., concur.

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[No. 6880. Decided March 4, 1908.]

KALAMA ELECTRIC LIGHT & POWER COMPANY, *Respondent*,  
v. KALAMA DRIVING COMPANY, *Appellant*.<sup>1</sup>

WATERS AND WATER COURSES—RIPARIAN RIGHTS—INJUNCTIONS—NAVIGABLE WATERS—RIGHTS OF DRIVING COMPANY—ARTIFICIAL FRESHETS. A riparian owner has the right to the natural flow of a stream through its lands for the purpose of creating power for its electric light plant, and may enjoin a log driving company from retarding the flow, to the injury of such owners, for the purpose of creating artificial freshets for the driving of logs down a stream which is not navigable for the floatage of logs at certain stages without such artificial means; the driving company having acquired no right to such use by condemnation proceedings.

Appeal from a judgment of the superior court for Cowlitz county, McCredie, J., entered June 13, 1907, upon findings in favor of the plaintiff, upon an agreed statement of facts, in an action to enjoin interference with the rights of a riparian owner to the waters of a navigable stream. Affirmed.

*Coovert & Stapleton*, for appellant.

*A. L. Miller* and *W. F. Magill*, for respondent.

Crow, J.—This action was commenced by the Kalama Light & Power Company, a corporation, against the Kalama Driving Company, a corporation, to enjoin the defendant from interfering with the natural flow of the waters of the Kalama river. An agreed statement of facts was filed, upon

<sup>1</sup>Reported in 94 Pac. 469.

which the trial court made findings and entered a decree enjoining and restraining the defendant from interfering with the usual and natural flow of water in the Kalama river through, upon, and by the plaintiff's land, and from using artificial dams for storing water and creating artificial freshets. The defendant has appealed.

The only question presented is whether this decree is supported by the findings. The findings of fact material to this question, in substance, show that the respondent Kalama Light & Power Company is a corporation organized under the laws of this state for the purpose of manufacturing and dealing in electric light and power; that it owns real estate on which its electric power plant, head gates, flumes, and other structures are located; that the Kalama river, which passes over and through its lands, and from which it takes water for power purposes, is a swift, mountainous stream about sixty miles in length, of sufficient width, depth, and capacity to be floatable for logs and other timber products during natural annual freshets of the fall, winter, and spring; that respondent's intake and head gates are located at low water mark; that the river at all seasons by its natural flow furnishes water in sufficient quantities for the operation of the light and power plant; that after diverting the water through the intake and flumes, the respondent returns it to the bed of the river, on its own premises; that respondent's plant is extensive and valuable, furnishing light and power to inhabitants of Kalama and Woodland; that the Kalama Driving Company is organized for the purpose of clearing and improving navigable streams, especially the Kalama river, and driving, sorting, and delivering timber products; that it has complied with all the requirements of the laws of this state under which it is incorporated; that after respondent had installed its light and power plant and had appropriated water for power, the appellant entered upon the river and commenced to improve the same by removing boulders, timbers, and other obstructions,

by building wing dams, splash dams, and other structures, by creating artificial freshets upon which to drive logs, during seasons when they could not be driven for the want of natural freshets; that an enormous amount of timber tributary to the river can be profitably driven to market upon the stream, but that all of it cannot be transported on the natural freshets, or without the aid of artificial freshets; that the appellant in conducting its business as a driving company is about to construct a large splash dam, one-half mile above respondent's light and power plant, intending thereby to collect and store water for creating artificial freshets at seasons when no natural freshets occur; that at all times when the water is being collected by this dam, its flow past respondent's land will temporarily cease; that it will require at least nine hours to collect and store the water each time the dam is closed, which will be a number of times each week; that while the dam is thus closed, the respondent's plant will be compelled to remain idle for want of sufficient water to create power; that respondent is a riparian owner of land abutting upon the stream, being the land upon which its plant is located, and that it will be irreparably damaged if the appellant is permitted to continue its interference with the natural flow of the water.

The Kalama river is a navigable stream, being useful for the profitable floating of timber products at seasons when natural freshets occur. The appellant has, under the laws of this state, authority to improve the river, to clear it from obstructions, to construct wing dams, splash dams, and other improvements, and to collect and store water for artificial freshets, thereby extending the navigability of the stream for driving purposes. Appellant contends that, in making such improvements, it has the right to retard the natural flow of the water whenever necessary for the creation of artificial freshets, and to do so without interference from the respondent. It insists that the state itself has the right, in the absence of Congressional interference or control, to improve all navigable

streams for the purpose of securing better transportation facilities to the public; that it may do so without interference or protest from riparian owners whose land is not actually taken, destroyed, or submerged; that when it, by statute, authorized appellant and kindred corporations to make such improvements, it delegated its own power and authority to them; that such delegation of authority is valid; that floatable streams are navigable public highways, and that the statutory right of driving companies to erect dams and other improvements, and to create artificial freshets on such floatable streams thereby improving and extending their navigability for public use, has been sustained by this court; citing: *East Hoquiam Boom & Logging Co. v. Neeson*, 20 Wash. 142, 54 Pac. 1001; *Watkins v. Dorris*, 24 Wash. 636, 64 Pac. 840, 54 L. R. A. 199; *Lowsdale v. Grays Harbor Boom Co.*, 36 Wash. 198, 78 Pac. 904; *Dawson v. McMillan*, 34 Wash. 269, 75 Pac. 807.

Having made the above contention, the appellant further insists that, as long as it does not trespass upon or take physical possession of respondent's lands, does not flood or destroy any portion thereof, and is not guilty of negligence while driving timber products or creating artificial freshets, but confines its operations to the bed of the river, it will not be unlawfully interfering with any of respondent's riparian rights. In effect, it contends that any incidental damage resulting to respondent from its operations upon the river will be *damnum absque injuria*. In support of these contentions appellant cites numerous authorities, including the following cases from the states of Wisconsin, Maine, and Oregon, upon which it predicates its principal arguments: *Falls Mfg. Co. v. Oconto River Imp. Co.*, 87 Wis. 134, 58 N. W. 257; *Black River Imp. Co. v. La Crosse Booming & Transp. Co.*, 54 Wis. 659, 11 N. W. 443, 41 Am. Rep. 66; *Cohn v. Wausau Boom Co.*, 47 Wis. 314, 2 N. W. 546; *Brooks v. Cedar Brook & S. C. R. Imp. Co.*, 82 Me. 17, 19 Atl. 87, 17 Am. St. 459, 7

L. R. A. 460; *Weise v. Smith*, 3 Ore. 445, 8 Am. Rep. 621; *Felger v. Robinson*, 3 Ore. 455. These authorities, which to some extent sustain appellant's position, cannot be followed or approved by us if we are to continue in harmony with our previous holdings in Washington cases hereinafter mentioned.

The respondent, being a riparian owner upon the Kalama river, has, as such, valuable property rights which cannot be taken or damaged for the public use without compensation. One of these is its right to a continuance of the natural and ordinary flow of the water over, across, and past its lands. Gould, Waters (3d ed.), § 204. This riparian right, guaranteed by the common law, has been repeatedly recognized and protected by this court. In *Monroe Mill Co. v. Menzel*, 45 Wash. 487, 77 Pac. 813, 102 Am. St. 905, we said:

"It being established that the stream is a navigable one, and that appellant shall not interfere with respondent's navigation of it, we must next inquire as to the methods and limitations of that navigation. The court refused to grant appellant an injunction preventing respondent from continuing the storage of water in Lake Roesiger, and the periodic flushing of the stream. We think this was error. Under well established principles, appellant is entitled to the natural flow of the water across his land. *Crook v. Hewitt*, 4 Wash. 749, 31 Pac. 28; *Rigney v. Tacoma Light & W. Co.*, *supra*; *New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 64 Pac. 735, 54 L. R. A. 190. It is said that, although language used in the above cases declares the general principle, yet there was an actual threatened diversion of a substantial portion of the water in each case, while, in the case at bar, there is no diversion, but simply a detention, followed by a restoration of all the water before it reaches appellant's lands. This detention, however, amounts practically to a total detention for irregular periods, and at times unknown to appellant, without warning, it is released in such quantities as to greatly increase the natural flow and, according to testimony in the record, actually causes an overflow of his lands."

In this case damages sustained by the respondent do not result from irregular and unexpected freshets created by the

sudden release of water through splash dams, but they are caused by an interruption of the natural flow of the river, depriving respondent of necessary water which, as a riparian owner, it is entitled to use in producing electric power. In *Matthews v. Belfast Mfg. Co.*, 35 Wash. 662, 77 Pac. 1046, we said:

"The next contention is that the court erred in enjoining the appellant from floating logs down the stream by means of artificial freshets and splashes. The argument is that the stream is a navigable one, and that it has the right to use it for the purpose of floating logs, and is liable only for a misuse or abuse of the privilege, and that the evidence fails to show that there was any abuse or misuse in the present case. The stream in question is undoubtedly navigable for floating logs for a part of the year, and during that time the appellant, as well as others, may use it for that purpose. But that is not the case before us. The appellant was not attempting to float logs during the navigable season of the year, but was attempting to do so when the stream in its natural state would not float them. It sought to remedy this by creating unnatural conditions—by the creation of artificial freshets—which conditions damaged and destroyed the respondent's property. This was an abuse of the right of navigation, and for that an injunction would properly lie."

See, also, *White v. Codd*, 39 Wash. 14, 80 Pac. 836.

The storing of water by the appellant's splash dams will so frequently and continuously retard the natural flow of the stream as to seriously interfere with and damage valuable riparian rights of the respondent. The operation of its light and power plant will be entirely obstructed while the water is being detained and stored by the dam. We are therefore compelled to hold that the appellant cannot thus damage or interfere with respondent's riparian rights, which are property rights, without first making full compensation. The power of appropriation by condemnation has been conferred upon appellant so that it may, by an exercise of the right of eminent domain, take or damage the property and shore rights of riparian owners in a lawful manner, making full compensation

therefor. The legislature, in conferring authority to improve the river and create artificial freshets, did not delegate to appellant the right to take or damage the respondent's property and shore rights without compensation. Any statute having such a purpose in contemplation would be in contravention of art. 1, § 16, of the state constitution and void. That the legislature never intended to violate the constitution by attempting to confer such authority is disclosed by Bal. Code, § 4388 (P. C. § 7121), which authorizes driving companies to appropriate, in proper condemnation proceedings, such property and shore rights of riparian owners, as it may need for its use as a public service corporation. The recent case of *Kasum v. Normand* (Ore.), 91 Pac. 448, is directly in point on the question of law here involved. In that case the supreme court of Oregon uses the following language:

"Nor can a stream, navigable in its natural condition at certain stages of the water, be made so at other times by artificial means, such as flooding and the like. No one has a right to store water, and then suddenly release the accumulation, and thus increase the natural volume of the stream, and overflow, injure, or wash the adjoining banks, or otherwise interfere with the rights of riparian owners. The riparian proprietor is entitled to the enjoyment of the natural flow of the stream with no burden or hindrance imposed by artificial means."

In support of the above statement, the court cites and discusses a number of authorities, including *Matthews v. Belfast Mfg. Co.* and *Monroe Mill Co. v. Menzel*, *supra*, decided by this court. It also distinguishes cases from Maine, Minnesota, and Wisconsin, some of which are cited by appellant.

The recent case of *Burrows v. Grays Harbor Boom Co.*, 44 Wash. 630, 87 Pac. 937, is in direct harmony with the views herein expressed. In *State ex rel. Burrows v. Superior Court*, *ante*, p. 286, 93 Pac. 426, we, in certiorari proceedings, afterwards sustained the holding of the trial judge that an appropriation of the right to erect splash dams and

Mar. 1908]

Syllabus.

create artificial freshets past lands of a riparian owner was an appropriation of private property for public use. There is no doubt but that all the rights and powers for which appellant contends have been conferred on it by statute, subject, however, to the condition that in the exercise of such rights and powers it cannot damage or take any of the property of riparian owners. If it wishes to damage or take such riparian rights for the public use, it is entitled to do so under an exercise of the power of eminent domain, unless such rights have been devoted to a prior public use.

The judgment is affirmed.

HADLEY, C. J., MOUNT, and FULLERTON, JJ., concur.

DUNBAR and ROOT, JJ., took no part.

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[No. 7000. Decided March 6, 1908.]

A. L. COOK, *Respondent*, v. CHEHALIS RIVER LUMBER  
COMPANY, *Appellant*.<sup>1</sup>

MASTER AND SERVANT—NEGLIGENCE—ASSUMPTION OF RISKS—NEG-  
LIGENT ACT OF FOREMAN—EVIDENCE—SUFFICIENCY. An employee does  
not assume the risk as one incident to the work of constructing a  
trestle, where it appears that the foreman negligently directed the  
attachment of a line to a timber in such a position that, upon tight-  
ening the line by his orders, planking at the top of a bent of piles  
was pushed loose and precipitated upon the employee below, who  
was not aware of the position of the line or given sufficient warning  
to enable him to reach a place of safety.

SAME—CONTRIBUTORY NEGLIGENCE. In such a case the employee  
is not guilty of contributory negligence in not anticipating the fall  
of the planking, where the operation was not the ordinary one of  
raising the timber, but merely to lift it sufficiently to enable the em-  
ployee to saw it, and the ordinary dangers were increased by the act  
of the foreman.

SAME—FELLOW SERVANTS—FOREMAN OF CONSTRUCTION WORK. In  
such a case, the foreman having direction of the work of construct-  
ing the trestle is not a fellow servant of an employee engaged in  
sawing off the timber, but is a vice principal.

<sup>1</sup>Reported in 94 Pac. 189.

**DAMAGES—EARNING CAPACITY—EVIDENCE—ADMISSIBILITY.** In an action for injuries to an employee working as a common laborer, evidence is admissible on the subject of his earning capacity as to his wages while working as a gold miner in another state.

**DAMAGES—PERSONAL INJURIES—EXCESSIVENESS.** A verdict for \$1,200 for injury to the knee is not excessive, where eleven months after the injury there was soreness and pain and contraction of muscles preventing the leg from straightening which would require a surgical operation to restore to normal condition.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered May 29, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee. Affirmed.

*George Dysart and E. R. York*, for appellant.

*Eugene Carr and Robert M. Davis*, for respondent.

FULLERTON, J.—The respondent recovered in this action for injuries received by him while in the employment of the appellant engaged in the construction of a logging railroad. The evidence relating to the manner in which the injury occurred is contradictory, but since the jury found in favor of the respondent, we must accept as true the version most favorable to his contention. In brief that version is as follows: At the time of the injury, the appellant was constructing a trestle across a gulch. The trestle consisted of piles driven in the ground by a steam pile driver in bents of four piles each, the bents being sixteen feet apart. After a bent was driven, timbers were nailed on the several piles composing it connecting it with the last preceding bent. These timbers were attached to the piles probably 2½ feet or 3 feet below the top level, and extended out from the front of the last bent some four or five feet. Heavy planks were then laid across the timbers both behind and in front of the bent, making a platform on which the workmen stood while sawing off the tops of the piles to bring them to the proper level, and while fitting the cross-piece thereon called the cap. This cap was a piece

Mar. 1908]

Opinion Per FULLERTON, J.

of timber 12x12 inches in size and 16 feet in length. It was fastened to the tops of the piles by pins and furnished the rests for the stringers on which the ties for the railway were laid. The piles and timbers for the caps were brought from a point on the opposite side of the gulch from that on which the work was proceeding to the working place by means of the pile driver line.

Just prior to the time the respondent was injured, a bent had been driven, and the timbers fastened thereto and the planks regularly placed. A timber for a cap was then dragged by means of the pile driver line from the opposite side of the gulch to the foot of the bent. This timber was too long for use as a cap, and the respondent and his fellow workman proceeded to saw it off with a crosscut saw. The saw pinched after the timber was partially cut through, and to relieve this one Hanson, who was the appellant's foreman directing the work from the top of the bent, ordered the pile driver line to be fastened near the middle of the cap; the purpose being to partially raise the timber by a strain on the line, thus removing the pressure which caused the saw to pinch. When the cap timber had been dragged from the other side of the gulch the line was on top of the planking which had been placed on the outside of the last bent, but while the respondent and his co-worker were sawing, it had been taken up by the foreman and let down between the bent and this planking. On being fastened to the cap timber at the the point directed, it was some 8 or 10 feet outward from the bent at the foot, and thus outward from a perpendicular to the upper fastening of the line. After the fastening had been made, the foreman ordered the engineer in charge of the pile driver to tighten up on the line. This caused the line to straighten, which in turn caused it to press outwardly on the loose plank placed on the outside of the bent. The result was that the planks were pushed off the projecting timbers, one of which fell and struck some object which broke it into two pieces, one of which pieces struck the respondent, causing the injuries for which he recovered in this action.

The respondent did not discover the position of the line prior to the time the order to tighten up on it was given, nor was sufficient warning given him after the planks started to fall to enable him to get into a place of safety.

There was uncontradicted evidence tending to show that the work in which the respondent was engaged at the time of the injury was work which he was employed to do; that the machinery and appliances used in and about the work were the usual and ordinary appliances used in similar work, and were appliances suitable for the purposes for which they were used; that the general manner in which they were used was the usual and customary manner of using such appliances; and that the ordinary dangers of the work were open and apparent to any one. There was testimony also to the effect that in hoisting a cap from the ground to the top of the bent the ordinary method was to put the rope between the bent and outside planking.

The appellant's first contention is that the falling of this board was one of the ordinary dangers incident to the business, and that the respondent must be held to have assumed the risk of injury from such a cause. The rule undoubtedly is that a servant assumes the risk of injury from dangers incident to his employment which are apparent to him and which the master does not undertake to remedy as an inducement to keep the servant at work, or is under no duty of positive law to discover and remedy. But this doctrine, it seems to us, has no application to the case before us. Here, clearly, the danger causing the injury was not one ordinarily incident to the employment. On the contrary, if the respondent's evidence is to be believed, the injury was caused by the grossest kind of negligence on the part of the appellant's foreman who was in immediate charge of the work. He directed a thing to be done which the slightest investigation must have told him would be highly dangerous to both of the men who were engaged in work at the foot of the trestle. The tightening of the rope, in the position it was placed by his

Mar. 1908]

Opinion Per FULLERTON, J.

orders, must necessarily throw off the planking from the projecting timbers, and it was gross carelessness to do this without warning the men below of their danger. This danger was not, therefore, a danger incident to the employment. It was one caused by the negligent acts of the appellant's foreman, and one which he could have avoided by using even ordinary prudence.

The cases of *Krickeberg v. St. Paul & Tacoma Lumber Co.*, 37 Wash. 63, 79 Pac. 492; *Olson v. McMurray Cedar Lumber Co.*, 9 Wash. 500, 37 Pac. 679; *Hoffman v. American Foundry Co.*, 18 Wash. 287, 51 Pac. 385; and the kindred cases cited by the appellant are not in point on this question. They lay down the rule that a servant assumes the risk of dangers ordinarily incident to his employment, and hold that the dangers causing the injuries in the several cases were such as the servant there assumed. But the facts in none of the cases were like the facts in the case before us. Here, as we say, the danger was one brought on by the negligent act of the appellant's foreman, and was not one incident to the employment at all. The question of liability was therefore for the jury. *Pearson v. Federal Min. etc. Co.*, 42 Wash. 90, 84 Pac. 632, and cases there cited.

It is next contended that the respondent was guilty of contributory negligence, in that he did not anticipate the falling of the planks and get out of the way. Had the ordinary conditions existed when the order was given to fasten the line to the cap timber and haul up thereon, it may be that the respondent would have been guilty of contributory negligence had a board from the trestle fallen upon him. But he was not bound to anticipate extraordinary conditions such as existed here. When the appellant, by the act of its foreman, voluntarily increased the ordinary danger, it must be shown that he had notice of that increased danger before it can be said that he was guilty of contributory negligence in not moving further away.

The appellant also contends that the foreman was a fellow

servant of the respondent, and that it is not responsible for his negligence for that reason. But without entering into a discussion of the question, we think the foreman was clearly a vice principal under the rules which we have heretofore announced. *Nelson v. Willey Steamship & Nav. Co.*, 26 Wash. 548, 67 Pac. 237; *O'Brien v. Page Lumber Co.*, 39 Wash. 537, 82 Pac. 114; *Dossett v. St. Paul & Tacoma Lumber Co.*, 40 Wash. 276, 82 Pac. 273; *Eidner v. Three Lakes Lumber Co.*, 45 Wash. 323, 88 Pac. 326.

It is also contended that the court erred in permitting the appellant to testify to his earnings while working for wages as a gold miner in another state. But we think the evidence admissible. The fact that the respondent was working as a common laborer did not prevent him from proving that he was skilled in another business in which he was capable of earning wages of skilled labor. *Chicago etc. R. Co. v. Long*, 26 Tex. Civ. App. 601, 65 S. W. 882; *Grimmelman v. Union Pac. R. Co.*, 101 Iowa 74, 70 N. W. 90.

Lastly the appellant complains that the amount of recovery was too large. The amount of the recovery was \$1,200. The injury was to the knee and had occurred some eleven months before the trial. At the time of the trial there was still soreness and pain, and a contraction of certain muscles preventing the leg from straightening; one of the doctors saying that a surgical operation would be necessary to bring it back to its normal condition. Under these circumstances we do not think the recovery so far excessive as to warrant interference with it by this court.

The judgment is affirmed.

HADLEY, C. J., MOUNT, and CROW, JJ., concur.

Mar. 1908]

Opinion Per HADLEY, C. J.

[No. 7120. Decided March 6, 1908.]

DANIEL W. VREELAND, *Appellant*, v. THE CITY OF TACOMA,  
*Respondent*.<sup>1</sup>

MUNICIPAL CORPORATIONS—ASSESSMENTS—COLLATERAL ATTACK. A special assessment may be attacked collaterally where the city had no power to make any levy for the purpose, although no objections were made before the city council.

SAME—POWER TO LEVY ASSESSMENT—NATURE OF IMPROVEMENT—WATER MAINS—CHARTER—CONSTRUCTION. A city of the first class having general power to levy special assessments for local improvements, and to determine what work shall be done on that plan, may levy assessments for the construction of water mains, although that subject is not generally mentioned; and a provision limiting the amount to be expended for streets and sewers does not restrict the power to those subjects, especially where charter regulations respecting the method of assessment for street improvements, expressly refers to all other public improvements when the cost is to be charged against the property.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered October 21, 1907, upon sustaining a demurrer to the complaint, dismissing an action to quiet title. Affirmed.

*Emmett N. Parker*, for appellant.

*C. M. Riddell*, *J. W. Quick*, and *C. E. Dunkleberger*, for respondent.

HADLEY, C. J.—This action was brought to remove an alleged cloud upon title to real estate, and to enjoin the enforcement of a local assessment against the property for the construction of water mains. The property holder as plaintiff instituted the suit against the city of Tacoma as defendant. The city interposed a demurrer to the complaint, which was sustained, and the plaintiff having elected to stand upon

<sup>1</sup>Reported in 94 Pac. 192.

his complaint, judgment was entered dismissing the action. The plaintiff has appealed.

The respondent contends that the action is a collateral attack upon the assessment proceedings, and that it is not maintainable for that reason. It is argued that appellant's remedy is under the special procedure provided for the filing of objections before the city council prior to the confirmation of the assessment roll, and by appeal from the action of the council to the superior court, followed by appeal from that court to this one. Respondent's contention in this respect should, without doubt, prevail if the attack were one involving mere irregularities of procedure. Appellant, however, bases his attack upon the alleged ground that the city of Tacoma has no power in any case to levy and collect a special assessment on the local improvement plan for the construction of water mains. Upon that theory he contends that the city acted without any jurisdiction whatever, and that its action may be attacked in this manner. If appellant's theory as to entire want of jurisdiction in the city is correct, then the proceedings may, under well known rules, be attacked collaterally or otherwise. It therefore becomes necessary to examine the contention of the appellant.

Tacoma is a city of the first class, the people thereof having framed and adopted their own charter in pursuance of the constitution and laws of this state. The city is, and since the year 1893 has been, the owner of a system of water works for the purpose of furnishing the inhabitants with a supply of water. During all of said time the system has been maintained and operated by the city, and water has been furnished to consumers in consideration of prices paid as exacted by the city. At no time prior to the year 1906 did the city construct or extend its system of distributing pipes or mains except at the general expense of the city and its taxpayers, or with funds derived as revenues from the water works. During said year the city adopted a local improvement district and undertook to construct water mains upon the special assessment

Mar. 1908]

Opinion Per HADLEY, C. J.

plan, charging the cost thereof to the real estate within the district according to benefits. It was in this manner that appellant's property was assessed. No question is raised that the proceedings were not in form and manner consistent with the procedure adopted by the city for special assessments for local improvements.

The sole contention is that the city, through its council, had no power to declare the construction of a water main a local improvement which could be constructed on the special assessment plan. This court held, in *Smith v. Seattle*, 25 Wash. 300, 65 Pac. 612, that a water main is such an improvement as may be constructed upon the local improvement plan. The legislature of this state has also recognized that water mains may come within the classification of local improvements, the expense of which may be paid by special assessments upon property benefited. Laws 1899, ch. 124. Section 1 of that act expressly enumerates water mains among other things as constituting subjects for local improvements when the city shall have power or authority vested in it by its charter or by any law of this state to order the construction. The act provides a method for issuing bonds of assessment districts to pay the costs of such construction, and for assessing the property benefited, to be collected in annual installments for the purpose of paying the bonds. In Illinois a water main may be constructed on the local improvement plan: *Hughes v. Momence*, 163 Ill. 535, 45 N. E. 300; *Palmer v. Danville*, 154 Ill. 156, 38 N. E. 1067. In 25 Am. & Eng. Ency. Law (2d ed.), page 1176, the following comprehensive definition of what constitutes a local improvement is found:

"Within this rule, a local improvement may be defined as a public improvement which, by reason of its being confined to a locality, enhances the value of adjacent property, as distinguished from an improvement which diffuses benefits throughout the municipality."

The same definition, in effect, appears in 25 Cyc. 1533, 1534. Under such comprehensive definitions it cannot be main-

tained, as argued by appellant, that when the term "local improvements" is used without more specific designation it should be held to be limited merely to street improvements and sewers.

Appellant argues that the power to make a special assessment for the construction of water mains is not found in the city charter. Section 52 of the revised charter of the city of Tacoma provides as follows:

"The City Government of Tacoma shall have power by ordinance and not otherwise— . . . Tenth—To provide for making local improvements and to levy and collect special assessments on property benefited thereby, and for paying the same or any portion thereof; . . . Thirteenth—To determine what work shall be done or improvements made at the expense, in whole or in part, of the owners of the adjoining, contiguous or proximate property, or others specially benefited thereby; and to provide the manner of making and collecting assessments therefor shall be as prescribed in this Charter."

It will be seen that the power conferred is very general. Subdivision 10, above quoted, broadly confers the power to make local improvements and collect special assessments, and, in the absence of any limitation, we think it must be held to include everything within the range of local improvement subject-matter. Again, subdivision 13 is just as broad in conferring power upon the city authorities to determine what work shall be done on the special assessment plan. It must be understood, of course, that the charter does not grant the power to arbitrarily declare any kind of work a local improvement without regard to its character. It must be of a character that confers special local benefits upon adjacent or proximate property within the legal definition of what constitutes a local improvement as given above.

Appellant argues, however, that subdivision 2 of § 52, *supra*, limits the charter powers for making local improvements to street and sewer construction. That subdivision is as follows:

"To provide for levying . . . taxes on real and personal property, for corporate uses and purposes, and to pro-

Mar. 1908]

Opinion Per HADLEY, C. J.

vide for the payment of the debts and expenses of the corporation; provided, that all taxes, whether general or special, exclusive of assessments for street improvements and construction of sewers, shall not exceed one and five-tenths per centum in any one year on the assessed valuation of the property of said city."

It will be seen that the provision in no way prohibits the doing of other classes of work as local improvements, but simply places the limitation upon the amount of general or special taxes that may be imposed in any one year, street improvements and sewer construction being declared as exempt from that limitation.

It is also contended by appellant that it was not the intention of the people when making the charter to confer local improvement powers upon the city authorities except for street and sewer construction, for the reason, as he alleges, that the scheme provided for levying and collecting special assessments is limited to those two subjects. Article 12 of the charter, comprising §§ 135 to 168, inclusive, treats of a method for making and enforcing special assessments, and article 13, comprising §§ 169 to 178, inclusive, is also devoted to that subject, the latter being confined to the subject of sewerage and drainage, while the former is more comprehensive. Appellant's theory is that article 12 is limited to provisions for assessments for street construction only. We find, however, that § 135, the opening one of article 12, refers in the very beginning to applications not alone for street improvement purposes, but also for "the improvement of public grounds or buildings, . . . and for all public improvements . . . where any part of the cost or expense thereof is to be assessed upon private property . . ." The above language seems clearly to contemplate that the city has the power to make other local improvements of a character different from those directly specified, and that the method of assessment there about to be outlined shall apply to all. If we should adopt appellant's view that the charter powers in the matter of local improvements are limited to street and sewer

construction only, we should be compelled to decide that the people in making their charter did not intend the words they used to import their full legal significance. This we are not authorized to do. No reason appears why the charter language shall not be given the comprehensive scope which it was apparently intended to have.

Respondent suggests that *Smith v. Seattle, supra*, is decisive of the points in this case. The case is in all essential respects similar to the one at bar. Appellant, however, points out this difference, that the charter of the city of Seattle specified water mains, among other things, as subject to construction on the local improvement plan, while the Tacoma charter does not in actual terms specify that subject. We have seen, however, that the broad language of the Tacoma charter includes every class of work that comes within the range of local improvements which may be constructed on the special assessment plan, and it must, therefore, include the construction of water mains.

A question much discussed in the briefs is whether, if the power is not found in the original charter, it has been conferred by subsequent legislative enactment having the effect of a charter amendment under the provision of art. 11, § 10, of the state constitution, that such charter "shall be subject to and controlled by general laws." Appellant contends that the charter cannot be so amended, and that any amendment must be made by the people of the city in order to conform to the constitutional intention to grant the powers of local self-government to cities of twenty thousand or more inhabitants. Inasmuch as we have found that the power is in the charter as made by the people of Tacoma, the above question is not necessarily in this case, and we shall not discuss it for that reason.

The judgment is affirmed.

FULLERTON, CROW, MOUNT, and ROOT, JJ., concur.

Mar. 1908]

Syllabus.

[No. 6807. Decided March 7, 1908.]

*In the Matter of The Estate of JOHN SULLIVAN, Deceased.*<sup>1</sup>

**DESCENT AND DISTRIBUTION—PROOF OF HEIRSHIP—EVIDENCE—SUFFICIENCY.** The evidence is sufficient to sustain findings that claimants are next of kin as the only first cousins, where deceased's parentage appeared from records of his parents' marriage, and parish records of baptism of himself and sisters and a brother, the prior death of his father, mother and sisters and brother being clearly shown, and where, a short time before his death, the deceased took out administration upon his sisters' estates, making oath that he was their only heir, and the relationship of the claimants with deceased's family was shown by satisfactory evidence, while the testimony of other claimants was largely traditional, and failed to establish the identity of their ancestor with that of deceased's.

**SAME—NEXT OF KIN—COUSINS—DEGREES—STATUTES—CONSTRUCTION.** First cousins take to the exclusion of second cousins under Bal. Code, § 4620, subd. 5, providing that in the absence of issue, husband, wife, father, mother, brothers or sisters, the estate shall go to the next of kin, in equal degree, excepting that, of collateral kindred claiming through different ancestors, those claiming through the nearest ancestor shall be preferred.

**ADMINISTRATORS—SETTLEMENT—EFFECT—SUBSEQUENT ORDERS—JUDGMENT—RES JUDICATA.** The settlement of a so-called final account of an administrator, does not preclude him from asserting, as an individual, error in subsequent orders affecting his relation to the estate since the making of the orders.

**ADMINISTRATORS—APPEAL—RIGHT TO APPEAL FROM DISTRIBUTION.** An administrator has an appealable interest in an order of final distribution of an estate, since it is his duty to guard against error in distribution without ample provision for obligations of the estate.

**ADMINISTRATORS—FINAL—DISTRIBUTION—PROVISION FOR DEBTS.** An order of final distribution of an estate, requiring all real and personal property except cash on hand to be turned over to the distributees at once, will, on appeal by the administrator, be modified so as to decree distribution subject to the charge for final settlement purposes, where more than a year has elapsed since the filing of the report showing the cash on hand, which cash may not be ample for all purposes of final settlement.

<sup>1</sup>Reported in 94 Pac. 483.

Appeal from a judgment of the superior court for King county, Griffin, J., entered January 30, 1907, upon findings in favor of certain claimants to the estate of a decedent, in an action to determine the lawful distributees thereof, after a trial before the court without a jury. Affirmed.

*Walter A. Keene, Richard Winsor, and G. A. C. Rochester,* for appellant Cornelius Sullivan.

*Kenneth Mackintosh and R. W. Prigmore,* for appellants State of Washington and County of King.

*Hughes, McMicken, Dovell & Ramsey,* for appellant Terence O'Brien.

*William B. Allison,* for appellants Margaret Sullivan Desmond *et al.*

*W. E. & Frank P. Burke, Oliver C. McGilvra, and John Kelleher,* for appellants Maria Lester *et al.*

*Geo. B. Cole, William C. Widdfield, and John E. Humphries,* for appellants Dennis J. Sullivan *et al.*

*Samuel H. Piles, George Donworth, James B. Howe, and Charles H. Farrell (Shank & Smith, of counsel),* for respondents Edward Corcoran *et al.*

HADLEY, C. J.—In this cause the superior court entered a judgment declaring who are the lawful distributees of the estate of John Sullivan, deceased. The several appeals hereinafter mentioned bring that judgment here for review. The deceased died in Seattle on September 26, 1900. He owned several tracts of real estate in Seattle, one of which consisted of two lots on First avenue upon which stood, and now stands, the four-story brick building known as the "Sullivan Building." That property is very valuable. Mr. Sullivan was a native of Ireland, and left that country when a very young man, first embarking upon a ship as a sailor. He came to Seattle many years ago, and was thereafter a resident of that city until the time of his death. In the year 1900 he visited Ireland and parts of the continent of Europe. He returned

Mar. 1908]

Opinion Per HADLEY, C. J.

home late in the summer of that year, and died soon after his return. He was never married. No written will was discovered, and it appearing that no testamentary disposition had been made of the estate, Terence O'Brien was, in November, 1900, appointed administrator. A large number of persons have at different times filed claims, seeking to share in the estate. All of these persons claimed to be heirs of the deceased, except Marie Carrau, who claimed the entire estate under an alleged nuncupative will. The claim of the latter was determined adversely to her, and the hearing now being reviewed was for the purpose of ascertaining the legal heirs of the deceased.

Edward Corcoran, of Dublin, Ireland, and Hannah or Johanna Callaghan, of Cork, Ireland, first asserted their claim to the estate in the year 1901, claiming as first cousins of the deceased. The final account of the administrator was filed in November, 1902, and the said Corcoran and Callaghan, claimants, filed a petition for distribution of the estate in the same month. The final account was settled in January, 1903, and the petition for distribution came on for hearing, but was continued from time to time until in November and December, 1906. Meantime other claims of heirship were made, and the state of Washington and county of King filed a petition for the escheat of the entire estate, on the alleged ground that the deceased died without heirs. Depositions in behalf of the various claimants were taken from time to time in Ireland and at different places in the United States and Canada. Under different commissions a number of witnesses who had formerly testified were reexamined. Through the medium of the depositions a large amount of evidence, both oral and documentary, was secured. This evidence, together with oral evidence heard at the time of the hearing, was submitted for the consideration of the court. After an extended hearing, the court made and entered findings of facts and conclusions of law, the substance of the more important and pertinent ones being hereinafter stated.

It was found, that the deceased was never married, and that he left neither issue nor descendant, nor wife, nor father nor mother, nor sister nor brother, nor uncle nor aunt, nor grand-uncle nor grand-aunt, nor ancestor lineal nor collateral, nor any person of nearer kin than first cousin; that he left surviving him his first cousin, the aforesaid Edward Corcoran, a lawful child of Margaret Corcoran, a deceased sister of the mother of said John Sullivan, and also left surviving him his first cousin and one of his heirs at law and next of kin in equal degree with said Edward Corcoran, the said Johanna Callaghan, a lawful child of his mother's deceased sister, Bridget Callaghan; that he left surviving him no other first cousin than the aforesaid persons, and no other person of as near kin to him as the said first cousins, and that at the time of the death of said Sullivan the said Corcoran and Callaghan were each entitled to an undivided one-half interest in said estate. It was further found, that on the 13th day of November, 1901, the said Johanna Callaghan, for a valuable consideration, executed and delivered to Samuel H. Piles a deed conveying to the latter an undivided one-half interest of the undivided interest of said Callaghan in all the property and assets of the estate of said deceased; that on the 15th day of the same month the said Edward Corcoran in like manner conveyed to said Piles an undivided one-half interest of his undivided interest in the property of the estate; that on the 21st day of April, 1904, said Johanna Callaghan died in Ireland, intestate, leaving surviving her as her only heir at law and next of kin her first cousin, the said Edward Corcoran, and leaving estate in King county, Washington, consisting of the aforesaid interest in John Sullivan's estate remaining in her after the execution of the deed above mentioned to Samuel H. Piles; that in May, 1904, Charles H. Farrell was duly appointed and qualified as administrator of the estate of said Johanna Callaghan, and that he is now such administrator.

From the foregoing facts the court concluded that Edward Corcoran is entitled to an undivided one-fourth of said estate

Mar. 1908]

Opinion Per HADLEY, C. J.

as heir at law and next of kin of said John Sullivan and, subject to the administration proceedings upon the estate of said Johanna Callaghan, he is also entitled to an additional undivided one-fourth of said estate; that Charles H. Farrell, as administrator of the estate of Johanna Callaghan, is entitled as such administrator to an undivided one-fourth of said estate for the purposes of administration; that Samuel H. Piles in his own right is entitled to an undivided one-half of the estate of the said Sullivan as the grantee of said Corcoran and Callaghan under the deeds above mentioned. A decree requiring distribution in accordance with the above conclusions was entered. The administrator, Terence O'Brien, was also directed to forthwith file a supplemental report showing all of his receipts and disbursements in the matter of said estate since January, 1903, when the final account was settled, and to pay the amount collected by him over to the aforesaid persons in the proportions above stated, after deducting from the gross amount collected since said date such amounts as the court shall, on consideration of such supplemental account, authorize to be deducted. The administrator was also directed to turn over to the distributees the possession of the personal property and real estate belonging to the estate.

There are five appeals from the decree of the trial court, representing as many distinct interests: (1) Cornelius Sullivan, who claims the entire estate as a surviving brother of the deceased John Sullivan; (2) Margaret Sullivan Desmond, Michael Sullivan, Johanna Sullivan, Roger Sullivan, and Philip Sullivan, who claim to be second cousins of the deceased, and that they are his next of kin and only heirs at law; (3) Maria Lester, Thomas Sullivan, Catherine McClellan, Margaret Croke, Ann Brooks, Martin Dwyer, Mary Ryan, Mary O'Brien, Alice Whalen, Dennis J. Sullivan, Timothy Sullivan, Owen Sullivan, Elizabeth Fatherby, Margaret Lusty, Catherine Brown, Rose Hodgins, Michael Hickey, John Hickey, Mary Nagle, Nora O'Leary, and Ann McCabe, who claim to be first cousins of the deceased; (4)

the state of Washington and county of King, who assert that Sullivan died without heirs, and who claim that his property has escheated; (5) Terence O'Brien in his own right and as administrator. With the exception of a very few minor particulars wherein we think no prejudicial error resulted, the errors assigned by the claimant appellants relate to the correctness of the court's findings of facts and conclusions of law. These assignments involve an examination of the entire evidence, since the cause is heard *de novo* here. The record of the evidence is very voluminous, including more than three thousand pages, some typewritten and some printed, as recording the testimony of living witnesses. All this, together with its accompanying mass of exhibits and documentary evidence, presented to us a record of formidable magnitude as we approached it with the desire to discover therefrom the truth in relation to the facts in controversy. The writer has endeavored to read the testimony of all the witnesses and, unless some of it has been inadvertently overlooked, he has read it all. The briefs in the case comprise more than one thousand pages, practically all of which is devoted to a discussion of the evidence. It must be seen, therefore, that an analytic discussion here of all the evidence upon the several appeals is wholly impracticable.

We think the findings of the trial court are sustained by evidence that is convincing. That evidence was to the effect that John Sullivan's parents were Peter Sullivan and Abigail McAuliffe, who were married at the church of St. Finbarr, in Cork, Ireland, in 1832. The parish records show the baptism of the children of this marriage as follows: Eliza in 1834, Ellen in 1836, and John in 1840. In all of these entries of baptism the names of the parents are given as Peter Sullivan and Abigail McAuliffe, except that in the case of the baptism of Eliza the name of the mother is given as "Abbey" McAuliffe. Investigation by counsel for the state and county discovered in the said parish records a record of the baptism of a fourth child of said parents, the child's name being

Mar. 1908]

Opinion Per HADLEY, C. J.

Timothy, and he having been baptized in 1844. The names of the other members of the family appeared in census returns, but the name of Timothy never appeared in any of these returns and, as he is not remembered by any of the living acquaintances of the family, of whom a number testified, counsel for respondents argue that it may be fairly presumed that he died at a very early age, which we think is altogether reasonable. The father, Peter, was for many years employed at Beamish & Crawford's brewery in Cork, and for some years before his death received a pension from the brewery which the brewery records show was paid up to and including the week of his death. The evidence clearly shows the death of the father, mother, and sisters long before the death of John Sullivan. The sister Eliza was never married. In the year 1877 she became insane and was committed to an asylum. She died in the private insane asylum of Dr. Bull, on Black Rock Road, Cork, in 1886. The sister Ellen was married at Cork in 1854, to Emanuel de Silva, a Portuguese sailor. No child was born to this marriage, and Ellen died in 1871. She was the first of the family, except Timothy, to die, and was followed by the mother, father, and sister Eliza in the order named. John left home when a young man and never returned to Cork until the year 1900. Eliza and Ellen each left sums of money on deposit in a savings bank in Cork, which had been lying for years unclaimed. When John was in Cork in the year 1900, he took out letters of administration for the purpose of withdrawing this money. He made oath that he was the surviving brother of the two women and that he was their next of kin and lawful heir. This money was afterwards remitted to John Sullivan at Seattle, and the draft was found among his effects after his death. It was cashed and became a part of the assets of his estate. The claiming of that money by the deceased, and the oath he made in order to get it, we regard as convincing evidence of his identity with the aforesaid family. He was undoubtedly the last of the family to survive. We are also satisfied from the evidence

that Edward Corcoran and Johanna Callaghan were the first cousins of the deceased from his mother's side of the family, and that they were the only surviving first cousins as found by the court. This is shown by the testimony of a number of Irish witnesses who knew them all, together with marriage and baptismal records.

Margaret Sullivan Desmond and her group of claimants admit the identity of John Sullivan's family as above stated, but they claim their relationship from the father's side, and that they are second cousins of the deceased. The survivorship of Corcoran and Callaghan as first cousins being established, it follows that the Margaret Sullivan Desmond group of claimants as second cousins are not entitled, under our statute, to share in the estate, for the reason that Bal. Code, § 4620, subd. 5 (P. C. § 2702), provides that in such case the descent shall be to the next of kin. The provision is as follows:

"If the decedent leaves no issue, nor husband nor wife, and no father nor mother, nor brother nor sister, the estate must go to the next of kin, in equal degree, excepting that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor must be preferred to those claiming through an ancestor more remote."

Under that statute first cousins are preferred to second cousins.

The Maria Lester and Dennis J. Sullivan group of claimants do not deny the identity of John Sullivan's parentage as found by the court, but they claim that they are first cousins of the deceased from his father's side of the family. The testimony in support of these claims is not convincing to us. Many of the claimants now reside in the United States and Canada, and their testimony is largely of a somewhat traditional character, by which they show that they have heard declarations from other members of their family that, from the marriage of their ancestors Timothy Sullivan and Hanor, Hanorah, or Mary Burke, there were seven sons and two daughters, one of the sons being Peter, who, they claim, was

Mar. 1908]

Opinion Per HADLEY, C. J.

the father of John Sullivan. This family resided in or near Dualla, Cashel Fethard, county Tipperary, Ireland, and the son Peter is said to have left home and gone to Cork to reside when he was a young man, and his family seem to have known but little of him after that time. We think the identity of this Peter Sullivan with that of John Sullivan's father is not established.

The claimant Cornelius Sullivan denies the identity of the deceased's parentage as above set forth, and claims that he is a surviving brother of the deceased. He asserts that the name of the deceased's father was Cornelius Sullivan, and that he was married to Johanna Harrington. He says that the above were the parents of five children, John, Mary, Jerry, Kate, and Cornelius; that the oldest, John, was the deceased John Sullivan, and that the youngest is the claimant himself. He produced witnesses who testified that they had heard John Sullivan say that he had a brother Cornelius, and also a brother Jerry. Some witnesses testified that a woman came to Seattle some years ago and remained some weeks, who was in and about the store of the deceased and to whom they heard him refer as his sister. The claimant says this was his sister Mary, but that he is unable to find what became of her after she left Seattle. This appears to constitute a chain of facts based upon the declarations of the deceased, but to establish them the claimant must assert, and does do so, that the deceased swore falsely when he made oath that he was the surviving brother of Eliza Sullivan and Ellen de Silva in order that he might withdraw their deposits from the bank in Ireland, and that, too, but a few months before his death. As against the positive testimony of many Irish witnesses who knew the family from the childhood of Sullivan, that he was their brother, and as against his own solemn oath to the same fact, we cannot consider the testimony submitted by this claimant as convincing.

The claimants the state of Washington and county of King do not deny the identity of the parentage of the de-

ceased as asserted by the respondents, and in their brief they admit that, if any fact is established by the evidence, it is established that John Sullivan was the brother of Eliza Sullivan and Ellen de Silva, but they assert that Sullivan died without surviving heirs. It is perhaps inconceivable that a human being may die leaving no heirs, no next of kin. Somewhere among men must be found his next of kin to whom the law of descent would carry his property. It is, of course, often impossible to prove who such may be, and in such cases the estate escheats. The state can maintain no claim if the next of kin show their right to inherit, as it is not the policy of the state to absorb private property if the legal heirs of a decedent are discovered. The counsel for the state and county have exercised great energy in this case and have apparently neglected no possible research in their efforts to show that the legal heirs of the deceased have not been discovered, but, for the reasons heretofore stated, we think their contention must fail. The findings of the trial court being well sustained by evidence in the record, which we think has not been overcome by other evidence, we shall not disturb them. We also think there was no reversible error in denying the motions for a new trial. Many days were spent in the trial, and an exhaustive hearing was had after long time for preparation. The affidavits in support of the motion for a new trial do not disclose any sufficient ground for going over the whole matter again.

The appeals of Terence O'Brien, individually and as administrator, raise the question that the court erred in decreeing a distribution of any part of the estate until all of the administrator's accounts, final and supplemental, have been fully settled. A motion has been made to dismiss these appeals, one on the ground that as administrator he has no appealable interest, and the other on the ground that as an individual he took no exceptions to the finding of the court that his final account was settled in January, 1903. That account has, in the light of subsequent history, become other than a final

Mar. 1908]

Opinion Per HADLEY, C. J.

account, although so called then and in this record. He is not precluded by that finding from asserting, as an individual, error as to the court's decree so far as it affects his relations to the estate since that so-called final account was filed and settled. As administrator he has an appealable interest, to the end that it is his duty to guard against the error of a distribution without some ample provision for all known obligations of the estate. The motions to dismiss the appeals are denied.

An account settled in January, 1903, was called the administrator's final account, but the necessity for prolonged administration having arisen by reason of contests between claimants for the estate, other and supplemental accounts have become necessary. The court found that the administrator had in his hands, in January, 1903, after the settling of his final account, \$1,120.42; that he has since that time received and disbursed certain sums of money on account of said estate, and that as shown by his last supplemental report he has in his hands a large sum of money belonging to the estate. The decree declares that said money belongs to, and should be paid to, the distributees, after deducting therefrom such amounts as the administrator shall by the court be authorized to deduct. A supplemental report, filed by the administrator by direction of the court on the day the decree of distribution was entered, showed a balance of cash in his hands of \$27,424.34. The court doubtless anticipated that this sum would be sufficient to meet the administrator's additional fees and other expenses, and so made the decree that the whole sum could be used for that purpose if required, but provided that any balance left shall be paid to the distributees. The additional amount to be allowed the administrator is yet to be determined after a full hearing upon that subject. More than a year has elapsed since said supplemental report was filed, and the sum in the administrator's hands must have materially increased from the estate's rent receipts. While the sum would be a large fund to reserve for settlement with an administrator of an ordinary

estate covering an ordinary period of administration, yet in view of the long time covered by the administration and the somewhat extraordinary features attending it, we think neither the trial court nor this court can prejudge the matter without a comprehensive hearing and say that the accumulated funds in the administrator's hands are ample for all purposes of final settlement. The court ordered that all the real estate and personal property except the cash shall be turned over to the distributees at once. In the interest of avoiding a prolongation of administrative expenses, we think the order to turn over possession should stand as made, but to avoid any embarrassment on the part of the court, if it should be determined that the administrator has not sufficient cash in his hands for all final settlement purposes, we think that part of the decree should be modified to the effect that the real estate shall be turned over to the possession of the distributees subject to the charge of any final settlement expenses, if the funds collected by the administrator shall be adjudged to be inadequate for that purpose.

The decree is in all respects affirmed except as to the modification above indicated, and the cause is remanded with instructions to proceed in accordance with this opinion. The appellant O'Brien in whatever capacity he has appealed shall recover his costs on appeal, and the respondents shall recover their costs on all the other appeals.

MOUNT, DUNBAR, FULLERTON, CROW, and RUDKIN, JJ., concur.

ROOT, J.—Before I became a member of the court, the firm of attorneys of which I was a member appeared in the superior court for certain persons claiming to have an interest as heirs in this estate—however none of such claimants is now before this court. There being in my mind some question as to my qualification to participate, I have taken no part in any of the decisions rendered by this court in the matter of said

Mar. 1908]

Opinion Per Curiam.

estate, and for that reason do not participate in the present instance.

## ON REHEARING.

[Decided April 17, 1908.]

PER CURIAM.—The appellants state and county, and also Cornelius Sullivan, have filed petitions for rehearing herein. In the petition of the state and county vigorous complaint is made of the following statement in the opinion: [*Ante* p. 639, 94 Pac. 486.] "The claimants, the state of Washington and county of King, do not deny the identity of the parentage of the deceased as asserted by the respondents." We concede that the statement quoted, when considered alone, is inaccurate; and we do not desire that counsel's contention shall be misunderstood by reason thereof. The entire sentence from which the above is taken reads as follows: "The claimants, the state of Washington and county of King, do not deny the identity of the parentage of the deceased as asserted by the respondents, and in their brief they admit that if any fact is established by the evidence, it is established that John Sullivan was the brother of Eliza Sullivan and Ellen de Silva, but they assert that Sullivan died without surviving heirs." The above statement in the opinion was based upon the following, which we here quote from the opening brief of appellants state and county, at pages 180, 181:

"Cornelius Sullivan claims as a brother to the deceased through wholly different parentage and necessarily repudiates Bessie Sullivan and Ellen Silva as sisters of the deceased. Like respondents, however, the evidence to establish Cornelius Sullivan's relationship depends largely and principally upon memory testimony of witnesses; and, regardless of how strong this testimony may be, the fact that John Sullivan has made sworn statements that Bessie Sullivan and Ellen Silva were his sisters, and the correspondence between Mrs. Lyons and John Sullivan, extending over a period of more than twenty years, with reference to the sister Bessie, and the character of that correspondence, unquestionably establishes that Bessie Sullivan and Ellen Silva were his sisters. If any fact is established by the evidence, it is the relationship of the deceased with these two sisters."

From the above concession that Eliza or Bessie Sullivan and Ellen de Silva were the sisters of John Sullivan, and with the fact established as our previous discussion in the opinion had stated, that the parents of the three were Peter Sullivan and Abigail McAuliffe Sullivan, we saw no room for dispute as to the identity of the parentage. The statement that the said appellants "do not deny the identity of the parentage" is, however, probably misleading to the reader not conversant with the case. While the appellants concede that the relationship of brother and sister existed between the three, yet they did, and do still, contend that the mother of the three was not Abigail McAuliffe Sullivan, but that her name was Eliza or Bessie. From this contention they deduce the conclusion that the mother was not the aunt of Johanna Callaghan and Edward Corcoran. As stated in the main opinion, we think the evidence established that Abigail McAuliffe was the mother, and that she was the aunt of Callaghan and Corcoran. No fact seemed to us to be more fully established than that Peter and Abigail McAuliffe Sullivan were the parents of Eliza or Bessie Sullivan and Ellen de Silva, and with these appellants conceding that John Sullivan was their brother, there seemed to be virtually no ground for dispute as to the identity of the parentage.

Counsel complain that the statement as made in the opinion puts them in the position of conceding a fact which they had never admitted. The explanatory correction herein made in no way affects the result in our minds, and we have made the statement for the reason that the writer of this and the former opinion, and also the members of the court desire that no apparent injustice may be done to counsel, who have certainly been untiring and vigilant in their efforts to secure what they in their petition for rehearing call "a splendid heritage to the school children of the state." The petition of Cornelius Sullivan is practically a reargument of the evidence as it was submitted at the hearing. We see no reason for changing our views of the evidence, and both petitions are denied.

Mar. 1908]

Opinion Per CROW, J.

[No. 6892. Decided March 9, 1908.]

EDITH J. BUDLONG, *Respondent*, v. MELISSA C. BUDLONG,  
*Appellant*.<sup>1</sup>

PLEADING—DEMURRER—EVIDENCE. A demurrer to a complaint is waived by answering to the merits.

APPEAL—REVIEW—PRESENTATION OF QUESTIONS. The sufficiency of the complaint cannot be first raised on appeal where, supplemented by evidence admitted, a cause of action is disclosed.

JUDGMENT—RES JUDICATA—DISMISSAL OF ACTION. The dismissal of an action "without prejudice" is not *res judicata* in a subsequent suit between the same parties for the same cause.

PARTIES—DEFECTS—WAIVER. A defect of parties is waived where the same is not raised by demurrer, answer, or otherwise in the court below.

TRIAL—ISSUES AND PROOF. One who waives a defense set out in her answer, and is permitted to offer proof of another defense which she fails to establish, and thereupon seeks relief under the defense that had been waived, cannot object that the court went out of the issues in the cause in deciding equities to which the parties appeared to be entitled under the evidence.

Appeal from a judgment of the superior court for King county, Albertson, J., entered May 6, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to recover possession of real property. Affirmed.

*P. P. Carroll, Walter B. Beals, and John E. Carroll*, for appellant.

*Robert A. Devers*, for respondent.

CROW, J.—This action was commenced by Edith J. Budlong against Melissa C. Budlong, to require the defendant to

<sup>1</sup>Reported in 94 Pac. 478.

comply with the terms of a certain contract or lease, and recover possession of real estate. The plaintiff alleged that, on November 10, 1898, one George E. Budlong and Melissa C. Budlong executed a written lease, the material parts of which read as follows:

"THIS INDENTURE WITNESSETH that George E. Budlong, party of the first part, and Melissa Caroline Budlong, the party of the second part have agreed and hereby stipulate and agree as follows, to wit: That for the sum of one dollar (and other good and sufficient consideration, the receipt of which is hereby acknowledged) paid and delivered by said party of the second part to the said party of the first part, the said party of the first part does hereby grant, lease and demise unto the said party of the second part, the following described property in the city of Seattle, county of King and state of Washington: the west forty-two feet of lot eight (8) in block seventy-one (71) of Terry's Second Addition to the said city of Seattle, . . . That the said use and lease is hereby granted for and during the lifetime of the said party of the second part, provided that this lease shall cease and determine from and after the marriage of the said party of the second part, it being understood that this lease is made for the use and benefit of the said party of the second part during her lifetime or as long as she remains a single woman; provided further that the said party of the first part shall have the right at any time to sell the said property; provided further that when said sale is made, said party of the second part shall surrender to the purchaser thereof the possession of the premises on the securing to her by the said party of the first part the monthly payment of the monthly rental value of the said premises; provided further that such payment shall cease and determine on the death or marriage of said party of the second part; . . . that when the said property is sold, should the said second party be entitled to the monthly rental value thereof and the means of securing it as hereinbefore provided, such value, should the parties not be able to agree thereon, shall be ascertained and determined by arbitrators appointed as follows: said first and second party shall appoint one person each and the said two persons so appointed shall select a third person, and the said three persons shall fix the rent to be paid monthly to the said party of

Mar. 1908]

Opinion Per CROW, J.

the second part, and shall determine upon the means of securing the same. . . .

"IN WITNESS WHEREOF, we have hereunto set our hands and seals this 10th day of November, 1898.

"George E. Budlong. (Seal)

"Melissa Caroline Budlong. (Seal)

"Witnesses: Pleasane Cozine, P. P. Carroll."

that George E. Budlong was then the owner of all of lot 8, which he, on December 5, 1904, sold and conveyed to the plaintiff; that thereafter in an action for divorce in which Edith J. Budlong was plaintiff and George E. Budlong was defendant, all of lot 8 was decreed to the plaintiff as her separate property; that about the time of its sale to the plaintiff by George E. Budlong, he and Melissa C. Budlong determined that \$18.50 was a reasonable monthly rental for the portion thereof covered by the lease, but that they failed to agree upon terms for securing the payment of such monthly rental; that on November 30, 1905, plaintiff and George E. Budlong notified the defendant, Melissa C. Budlong, in writing; of their appointment of a suitable person to act as arbitrator, and requested her to appoint an arbitrator, which she neglected and refused to do, and that on April 6, 1906, plaintiff served another and like notice on the defendant who, being in possession of that portion of lot 8 covered by the lease, again refused to appoint any arbitrator or surrender possession. Plaintiff prayed that Melissa C. Budlong be compelled to perform the contract on her part; that she be required to appoint an arbitrator, or that such appointment be made by the court, and that upon the plaintiffs furnishing security for the monthly rental, the defendant be required to surrender to plaintiff possession of the property.

The defendant admitted the execution of the lease, and affirmatively pleaded estoppel, former adjudication, and the statute of limitations. The evidence shows that George E. Budlong and the defendant, Melissa C. Budlong, were formerly husband and wife; that they were divorced about the year 1893; that George E. Budlong, being then the owner

of lot 8 as his separate property, the lease above set forth was executed in settlement of property rights; that George E. Budlong afterwards married Edith J. Budlong, to whom he sold and conveyed all of lot 8; that there have been frequent disputes and some litigation between the parties concerning the property and its possession; that Edith J. Budlong has been divorced from George E. Budlong; that in her action for divorce all of lot 8 was decreed to her as her separate property, and that George E. Budlong had died after the commencement, but before the trial, of this action. When this cause was called for trial the defendant, by her counsel, orally disclaimed and waived any defense under the lease or the affirmative allegations of her answer theretofore pleaded, but asked permission to amend her answer by pleading title in herself by adverse possession. The amendment being allowed, she offered evidence which failed to show any adverse possession, but did show that she was only in possession under the lease. The trial judge having announced that he would so find, the defendant offered to withdraw her defense of title by adverse possession, and demanded that she be permitted to defend her rights under the lease. After strenuous objections and exceptions by the plaintiff, the trial judge granted defendant's request, stating, however, that, as he doubted the authority of a court of equity to compel the appointment of an arbitrator by a decree for specific performance, he would admit evidence of the rental value and determine the same himself. Although some objection was at first made to this procedure by the defendant, the record shows that she assented thereto.

The trial court thereafter found the execution of the lease; that George E. Budlong conveyed to Edith J. Budlong the entire lot which was afterwards awarded to her in the divorce proceeding; that after the sale to the plaintiff, George E. Budlong and Melissa C. Budlong agreed upon \$18.50 as a reasonable monthly rental, but that he failed to tender any security for its payment; that prior to the commencement of this action plaintiff offered to comply with all the terms of the

Mar. 1908]

Opinion Per Crow, J.

lease; that the defendant refused to comply therewith or surrender the premises; that the rental value of the leased property was at the date of sale to plaintiff, and is now, \$18.50 per month, and that no issues raised in this action have heretofore been determined by any decree of court. Upon these findings of fact a decree was entered which, in substance, provided that, upon the execution and delivery of a bond to the defendant in the sum of \$5,600 to secure the payment of \$18.50 monthly rental, the plaintiff, as vendee of George E. Budlong, should be awarded possession of the premises. From this judgment the defendant has appealed.

Appellant's first contention is that the trial court erred in overruling her demurrer to the complaint. There is no order in the record passing upon the demurrer, which was served on September 10, 1906, but not filed until September 22, 1906, when the answer was also filed. This condition of the record suggests that the demurrer was not insisted upon or presented to the trial court, but it was, in effect, waived by answering. Appellant cannot predicate error on an order not shown by the record and probably never made. Nor can she now successfully attack the sufficiency of the complaint for the first time in this court, as its allegations, supplemented by the evidence admitted, disclose a cause of action in favor of the respondent.

Appellant further contends that the trial court erred in refusing to uphold her plea of *res adjudicata*. She introduced the pleadings in cause No. 41404 in the superior court of King county, showing that the parties, issues, and subject-matter were substantially identical with those of this action. The final order, however, which she also offered, expressly recited that the action was dismissed *without prejudice*. Such order was not a final adjudication between the parties on the issues joined.

Appellant insists there is a defect of parties, George E. Budlong not being made a party plaintiff or defendant. This question was not raised in the lower court by special demurrer or answer or otherwise, and was therefore waived. The con-

tention is also made that the findings are not sustained by the evidence. Without discussing the evidence in detail, we hold that the findings are supported by its clear preponderance, and that they warrant the final decree entered.

Appellant insists that respondent's cause of action is barred by the statute of limitations, and indulges in much discussion of this and the further proposition that the respondent is entitled to no remedy whatever in this equitable action, which appellant contends is one for specific performance. It is not necessary to enter upon a critical examination of these questions, or the pleadings. The appellant at the trial first predicated her defense on her affirmative allegation of title by adverse possession, and expressly waived any claim under her former defenses or her lease. After her failure to show title by adverse possession, she insisted that the trial court protect her rights under the lease and permit her to enforce the same. For that purpose she offered to withdraw her claim to title by adverse possession and, over respondents objection, was allowed to do so, it being apparent to the trial judge that she was entitled to a monthly rental of which she should not be deprived on account of her mistake in waiving her claims under the lease when alleging title by adverse possession. Appellant had, in fact, failed upon the affirmative defense which she first attempted to prove and on which she had elected to stand, but in the interests of justice and equity the trial judge permitted her to withdraw that defense, to rely upon her claim to a rental under the lease, and to show the value of such rental. Considering the allegations of all the pleadings, the issues they present, and the history of the trial, we are convinced that the learned trial judge properly exercised his discretion and evinced excellent judgment in passing upon the issues, in arriving at an equitable conclusion, and in protecting the rights of both parties. The appellant is in no position to complain of the procedure adopted.

The judgment is affirmed.

HADLEY, C. J., MOUNT, and RUDKIN, JJ., concur.

DUNBAR, FULLERTON, and ROOT, JJ., took no part.

Mar. 1908]

Opinion Per CROW, J.

[No. 6905. Decided March 9, 1908.]

**JOHN NELSON, Appellant, v. ALEX CARLSON, Respondent.**<sup>1</sup>

**APPEAL—REVIEW—DISCRETION—NEW TRIAL.** The refusal to grant an extension of time for filing a new trial will not be reviewed except for abuse of discretion.

**WITNESSES—COMPETENCY—TRANSACTION WITH DECEASED.** In an action to recover an interest in property as an heir of defendant's alleged wife, the defendant is incompetent to testify that he was never married to the deceased, since it would be evidence of a transaction between himself and the deceased.

**MARRIAGE—EVIDENCE—ADMISSIBILITY—REPUTE.** Evidence of cohabitation, repute and holding each other out as husband and wife, is admissible as tending to show a prior ceremonial marriage, whether a common law marriage is valid or not.

**SAME—SUFFICIENCY.** The evidence is sufficient to establish a marriage, where it appears that the parties cohabited and lived together as man and wife in several states, executed deeds as such, and the wife was buried and a monument erected by the husband describing her as his wife.

Appeal from a judgment of the superior court for Kitsap county, Frater, J., entered December 22, 1906, upon findings in favor of the defendant, after a trial on the merits before the court without a jury in an action to quiet title. Affirmed.

*Jerold Landon Finch*, for appellant.

*John G. Barnes*, for respondent.

Crow, J.—Action by John Nelson against Alex Carlson, to quiet title to land in Kitsap county to which plaintiff holds the record title. The defendant alleged fee simple title to an undivided half of the land in himself, as sole heir at law of his mother, formerly one Christina Alida Carlson, whom the plaintiff married before he acquired the land, which became and continued to be the community property of plaintiff and defendant's mother, until she died intestate in 1902. The

<sup>1</sup>Reported in 94 Pac. 477.

existence of the alleged marriage, which was denied by the plaintiff, is the controlling issue in this case. The trial court found that the plaintiff and Christina Alida Carlson had intermarried as alleged, and entered a decree in favor of the defendant as her sole heir at law, awarding him an undivided one-half interest in the land. The plaintiff has appealed.

The appellant was not represented on the trial by the attorney now representing him, who was afterwards substituted. At the close of the evidence appellant's former attorney made a motion to dismiss, which was denied, the respondent having filed a cross-complaint asking affirmative relief. The trial occurred November 9, 1906, after the substitution of attorneys, findings of fact, conclusions of law, and decree were signed and entered. On January 15, 1907, appellant made an application, supported by affidavits, for an order extending his time within which to file a motion for a new trial, which motion he then tendered. Appellant's first contention is that the trial court erred in refusing this application. A trial judge, exercising his discretion, may grant such an extension of time. *Bailey v. Drake*, 12 Wash. 99, 40 Pac. 631; *Leavenworth v. Billings*, 26 Wash. 1, 66 Pac. 107. Having carefully examined the affidavits, we are unable to conclude that the trial judge abused his discretion or committed prejudicial error in refusing the extension requested. In any event, all of the questions suggested by the proposed motion for a new trial are, by proper procedure, presented in the record for our consideration upon this appeal.

The respondent testified that he was the son of Christina Alida Carlson by her former husband; that he and his mother were natives of Sweden; that, when he was about ten years of age, she, being a widow, left him with friends in the old country and came to America; that about 1882 she and the appellant, whom he understood his mother had married, sent him money to come to them in the state of Colorado; that they were living as husband and wife in Colorado at that time; that he afterwards went with them to the state of California,

Mar. 1908]

Opinion Per Crow, J.

where they lived as husband and wife; that they came to Washington in the year 1882; that they purchased the land in March, 1887, taking title in the appellant's name, and made it their home until Mrs. Nelson's death in September, 1902; that appellant erected a monument to respondent's mother upon which he inscribed her name as Mrs. Nelson; that he called her his wife; that she called him her husband; and that they were continually known and regarded as husband and wife for more than twenty-two years, by all of their neighbors, friends, and acquaintances, in Colorado, California, and this state. Other witnesses testified to the same facts, which were not disputed. Respondent also introduced certified copies of deeds and land contracts, executed and acknowledged by the appellant, John Nelson, and Mrs. Nelson, as husband and wife, in the years 1884, 1888, 1900, and 1902.

After the respondent had rested, the appellant was asked by his attorney whether, in 1880 to 1882, he and the deceased were ever married to each other. To this question an objection was sustained, on the ground that, under Bal. Code, § 5991 (P. C. § 937), the appellant was incompetent to testify as to any transaction between himself and the deceased under whom the respondent, as an adverse party, claims title. The appellant, who offered no other evidence in rebuttal, now contends that the trial court committed prejudicial error in making such ruling. Under the authority of *O'Connor v. Slatler*, 46 Wash. 308, 89 Pac. 885, decided since the trial of this action, the ruling of the trial court must be sustained. In *Edelstein v. Brown* (Tex. Civ. App.), 95 S. W. 1126, a suit similar to this, wherein the heirs at law of a deceased mother sought a recovery of her interest in community property, the court of civil appeals of the state of Texas, construing a similar statute, held that the defendant, alleged to have been the husband of the decedent but who denied the marriage relation, could not be permitted to testify that he was never married to the mother of the plaintiff, that he and she had never agreed in any way to become husband and wife, or that

he never at any time agreed with her to become her husband. See, also, *Bartee v. Edmunds*, 29 Ky. Law 872, 96 S. W. 535.

The appellant contends that the trial court erred in finding that he and respondent's mother were husband and wife, insisting that a common law marriage contracted in this state has no validity here; that the respondent relies only on a common law marriage contracted in Colorado, and that the evidence is not sufficient to show such a marriage under the laws of that state which were neither alleged nor proven. Although in the case of *In re McLaughlin's Estate*, 4 Wash. 570, 30 Pac. 651, 16 L. R. A. 699, common law marriages were held invalid if originally contracted and consummated in this state, we have since sustained the validity of such marriages which had been contracted and consummated in other states where they were lawful under the *lex loci contractus*. *Willey v. Willey*, 22 Wash. 115, 60 Pac. 145, 79 Am. St. 923. Appellant, however, mistakes respondent's position when he assumes that respondent, in producing evidence, was only relying upon a common law marriage contracted in the state of Colorado. On the contrary he was attempting to show a valid marriage between the parties, although no direct evidence of any formal ceremony, certificate of marriage, or official record was offered. In the case of *In re McLaughlin's Estate*, *supra*, this court said:

"In all cases, whether common law marriages are recognized or not, evidence of cohabitation and repute is admissible, as tending to show a valid marriage; holding each other out as husband and wife to the public, and continued living together in that relationship has ordinarily, if not universally, been held sufficient proof, unless contradicted, to establish it even within those states where common law marriages are not recognized."

See, also, 26 Cyc. 872, and cases cited.

True, such presumption of a lawful marriage may be overcome, but the appellant has not denied his long-continued relations with the deceased. They stand admitted, unchallenged, and unexplained. Before coming to this state he and re-

Mar. 1908]

Statement of Case.

spondent's mother lived together as husband and wife for a number of years in Colorado and California. Appellant always recognized her as his wife. He held her out to the world and his associates as such, and introduced her as Mrs. Nelson. By no act, word, or deed does it appear that he ever questioned his matrimonial relation with her, until he filed his reply to the respondent's answer in this case. During her lifetime she joined him in the execution of numerous conveyances of land. He buried her as his wife, and erected a tombstone to her memory, on which her name was inscribed as Mrs. Nelson. Under this evidence we are compelled to hold that the appellant and respondent's mother were husband and wife. *Summerville v. Summerville*, 31 Wash. 411, 72 Pac. 84; *Shank v. Wilson*, 33 Wash. 612, 74 Pac. 812; *Potter v. Potter*, 45 Wash. 401, 88 Pac. 625.

We find no prejudicial error in the record. The judgment is affirmed.

HADLEY, C. J., MOUNT, FULLERTON, and ROOT, JJ., concur.

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[No. 7130. Decided March 10, 1908.]

**JAMES G. STEWART, *Appellant*, v. STATE BOARD OF MEDICAL EXAMINERS *et al.*, *Respondents*.<sup>1</sup>**

JUDGMENT—PREVENTING ENFORCEMENT—COMPLAINT—SUFFICIENCY—ENTRY—PRESUMPTIONS—HOLIDAYS. Proceedings under a judgment will not be restrained on the ground that the judgment was entered on a holiday, where it merely appears from the complaint that on a holiday the judge heard the arguments, announced his decision, and directed a judgment to be entered; since it will be presumed that the judgment was properly entered at a subsequent date.

Appeal from a judgment of the superior court for King county, Albertson, J., entered June 8, 1907, upon sustaining a demurrer to the complaint, dismissing an action to enjoin

<sup>1</sup>Reported in 94 Pac. 472.

proceedings under a judgment sustaining the action of the state board of medical examiners in revoking plaintiff's license. Affirmed.

*Edgar S. Hadley and William Parmerlee, for appellant.*

*Walker & Munn and Anthony M. Arntson, for respondents.*

Root, J.—On the 16th day of June, 1906, a petition was filed with the state board of medical examiners, praying that the license of plaintiff as a physician be revoked, and thereafter an order was entered by said board revoking said license. Thereupon this plaintiff appealed to the superior court for Pierce county, and the matter came on for hearing before Judge Linn of Thurston county, who was presiding in said case. Plaintiff's complaint herein alleges that, on the 6th day of November, 1906, the same being a legal holiday, to wit, the day upon which a general election for the state of Washington was held throughout the state, Judge Linn heard arguments "upon the demurrers to the defendants' answers, and on said date, without authority and contrary to the laws of the state of Washington, did render his judgment sustaining said demurrers to defendants' answers, and then and there announced his judgment sustaining said demurrers, and directed a judgment against the plaintiff herein, sustaining the action of said medical board in cancelling the plaintiff's license." By the present action he seeks to prevent any proceedings being taken under the judgment entered in the aforementioned proceeding. To the complaint herein the defendants interposed a demurrer which was sustained by the trial court; and the plaintiff electing to stand upon his complaint, a judgment of dismissal was entered. From this, plaintiff appeals.

Appellant contends that the judgment of the superior court, cancelling his license, was absolutely void because of what the trial judge did upon the holiday as above set forth. We are unable to agree with this contention. It does not appear that the judgment was entered upon that day. The mere

Mar. 1908]

Syllabus.

fact that arguments were heard upon demurrers and that the judge "announced" and "directed" a judgment does not amount to an allegation that the judgment was entered upon that day. For aught that appears in this complaint, the trial judge may have heard further argument or a reargument thereafter, and may have reviewed the entire case and entered judgment accordingly. There is nothing to show that appellant in any way objected to the action of the court in hearing arguments, passing upon the demurrer or announcing and directing a judgment upon the day in question. It is true that under our law no court can legally transact, or be open for, any judicial business of the character here involved on a legal holiday. But under the allegations of this complaint, we cannot say that the judgment, presumably entered in the proper manner subsequent to said date, was entered pursuant to any of the proceedings had on said holiday, and are not prepared to say that the same is void.

The judgment of the superior court is affirmed.

HADLEY, C. J., CROW, MOUNT, and FULLERTON, JJ., concur.

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[No. 6883. Decided March 12, 1908.]

MABLE OLMSTEAD, *Respondent*, v. HASTINGS SHINGLE  
MANUFACTURING COMPANY, *Appellant*.<sup>1</sup>

MASTER AND SERVANT—NEGLIGENCE—CAUSE OF INJURY—EVIDENCE—SUFFICIENCY. In an action for the death of an operator of a shingle saw, a verdict for the plaintiff cannot be sustained, and should have been directed for the defendant, where it appears from the evidence that no one saw the accident, that the deceased had evidently fallen on the saw, where his body was found badly cut, and his fall upon the saw might have happened in a number of ways, and there was no substantial basis for the theory that the accident was due to the negligence of the defendant; since the jury would have to guess as to the cause.

<sup>1</sup>Reported in 94 Pac. 474.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered January 16, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages for the death of a sawyer employed in a shingle mill. Reversed.

*Newman & Howard*, for appellant.

*Findley & Welch*, *H. M. White*, and *R. W. Greene*, for respondent.

MOUNT, J.—This action was brought by respondent, Mable Olmstead, in her own behalf and as guardian of her two minor children, to recover damages on account of the death of her husband, H. M. Olmstead, alleged to have been caused by negligence of the appellant. The defense was a denial of negligence, an allegation of assumption of risk, contributory negligence of the deceased, and settlement between appellant and respondent. On these issues the cause was tried to the court and a jury, resulting in a verdict and judgment for the respondent in the sum of \$10,000. The defendant appeals and assigns numerous errors, one of which is that the trial court, upon the undisputed facts, should have directed the jury to return a verdict in favor of the defendant.

The facts, so far as they relate to the injury and the negligence of the appellant, are substantially these: For twelve days prior to the 19th day of February, 1903, the deceased, H. M. Olmstead, had been employed as a sawyer in the shingle mill of appellant at Wahl Station in Whatcom county. For about one year previous to that time the deceased had been employed about the mill in different capacities, part of the time as engineer and fireman, part of the time as packer, and filing and hammering saws, and part of the time as extra man at the saws. He had been employed for one hundred and fifty-six days out of nearly a year, prior to the accident herein-after mentioned. During the twelve days he was employed as regular sawyer at one of the shingle machines as above stated,

Mar. 1908]

Opinion Per MOUNT, J.

his work was at night. The place was lighted by an electric lamp which hung immediately above his head. The shingle machine at which deceased worked was known as a "Letson & Burpee upright shingle" machine. It was of standard make, with one exception which will be stated hereafter. It consisted of two circular saws about thirty inches in diameter, one of which was at the left of the operator and cut the shingles automatically from a block and dropped them onto a table. This saw was known as the "shingle" saw. The other saw was immediately in front of the operator and known as the "jointer" saw. This jointer saw was stationary in a table about thirty inches in height, and extended through a slot in the top of the table about five to six inches above the plane of the table. A spring board was attached to the table at the left near the shingle saw, and extended in front over the jointer saw between the operator and the saw. In jointing shingles the operator would place a shingle on top of this spring board over the saw, and then press the board down, carrying the shingle onto the saw which trimmed off the edges of the shingles and otherwise made the finished product. A shaft or arbor of the shingle saw extended across the top of this table, and lengthwise of it, about eight inches behind the jointer saw, and parallel with it. The top of the jointer saw was three feet above the floor and a little higher than the arbor or shaft of the shingle saw. A shingle chute was in front of the operator over the jointer table, above the arbor of the shingle saw. Shingles after being jointed were tossed by the operator into this chute directly in front of him, good shingles to the left and culls to the right. These shingles slid down the chute to the floor below. On the arbor of the shingle saw and to the right of the operator, a pulley was attached around the arbor of the shingle saw. This pulley was not made by the manufacturers of the machine, but was constructed by the appellant of old belting, one-half inch in thickness and about eight inches wide, wrapped twice around the arbor and laced with lacing; and also at the edge toward the saw a clamp of iron,

about one inch wide and one-fourth of an inch thick, was placed over this belting. The ends of the clamp were bent at right angles to the arbor, and a small bolt placed through the ends so as to clamp the belt pulley tightly to the arbor and prevent the pulley from slipping on the arbor. The ends of this clamp projected at right angles to the arbor about an inch or an inch and a half. The end of the small bolt also projected from the jaws of the clamp. A belt ran over this pulley between the clamp and the box at the end of the arbor, and covered all the space between the clamp and the box. This clamp and pulley belt were just below the floor of the shingle chute above mentioned, and barely cleared it as the arbor revolved. This pulley was not a part of the machine as manufactured, and was placed there for the purpose of causing the shingle saw feed to run more rapidly. Shingles and culls frequently accumulated or "swamped up" on the chute leading to the lower floor of the mill, and the customary way to free the chute of this "swamp" was for the operator to push the accumulation down with a shingle held in his right hand. In pushing an accumulation of the culls, the hand of the operator would come near the revolving clamp. He would not have his hand near this clamp for any other purpose.

As stated, the deceased had operated this machine regularly for twelve days on a night shift. It was his duty to keep the machine in order by oiling it often, and to change one of the saws about every two hours and the other about every four hours. On the night of February 19, 1903, he went on duty about seven o'clock p. m. He was killed at 1:30 o'clock that night by the jointer saw, about thirty minutes after he had gone to work after his midnight meal. No one saw the accident or how deceased happened to come in contact with the saw. The last seen of him alive was when he was standing in front of the jointer saw smoking his pipe. About a minute or two afterwards a noise was heard by the engineer and other employees, a cloud of dust arose around the machine, and the engineer, thinking something was wrong, ran to his engine and

Mar. 1908]

Opinion Per MOUNT, J.

stopped the machinery. The deceased was then found lying dead on the jointer saw. A part of his clothing was wrapped around the clamp and on the arbor, a cut extended from near his backbone round to the right side up into his chest in front where the saw stopped. The jointer saw was in his body, and he was lying on the spring board, face downward, with his chin near the base of the spring board. Part of his shirt and jumper was torn off and wrapped around the clamp and arbor of the shingle saw. The index finger of his right hand was cut off through the large knuckle. His right arm had been cut nearly off close to the body by the saw, and the arm was between the jointer saw and the arbor. The clothing was attached to the clamp and arbor and had to be cut before the body could be removed. After the accident there were no shingles on the chute in front of the machine, but there were some shingles below in the bin.

The respondent contends, that the clamp, with its projections from the arbor of the shingle saw in close proximity to the shingle chute where deceased was required to work and where he was frequently required to remove accumulations, rendered the place unsafe; that appellant knew of the dangerous character of the place and was therefore guilty of negligence in maintaining the said clamp with such projection. The theory of respondent as to how the accident happened is, that a pile of the shingles had accumulated in the cull chute; that deceased undertook with a shingle to remove the same, and while so doing the sleeves of his shirt and jumper were caught by the projection on the arbor and threw the deceased into the saw. The appellant, on the other hand, contends that the place was reasonably safe; that the deceased had full knowledge of the dangers, which were open and apparent, and therefore assumed the risk; that if the appellant were negligent in maintaining the clamp as stated, the evidence fails to show that such negligence was the cause of the injury; that there is no evidence that the deceased was caught either by the revolving arbor or the projecting clamp, and thereby drawn onto the saw.

It is not necessary for us to discuss any other point than the one last mentioned. The only evidence that the deceased came in contact with the projection on the clamp and was thereby drawn into the saw is the fact that, after his death, some of his clothing was wound around the arbor and this clamp. Whether this occurred before his death or afterwards does not appear. There is no evidence whatever to show that his clothes were caught in the clamp before he came in contact with the saw. The machinery was in motion for a short time after his death, and it is as reasonable to suppose that the clothing was caught by the clamp and wound around the shaft after death as before. In fact, if the clothing of the deceased was caught by the revolving arbor before he was killed, the clothing must have been torn loose from the body in an instant, because this arbor revolved rapidly, the power was necessarily great, and naturally in less than a second of time the clothing would have been stripped from the arm, or the arm itself wrapped around the arbor. Such was not the result. After the machine was stopped the clothing of deceased was still attached both to the arbor and to his arm, thus showing that the clothing became attached to the arbor just about the time the motion of the machinery was stopped. It is shown that the shingles frequently swamped on the chute, and that then it was customary for the deceased to remove them by shoving them down by means of a shingle held in his right hand, which then came close to this clamp; that unless the shingles were so swamped, the operator had no occasion to come in contact with the clamp on the arbor. There was no evidence to show that, prior to the injury, any swamp had occurred in the chute. It was, therefore, not shown to be necessary for deceased to have his hand or his clothing near the clamp.

It is argued that, because no shingles were found in the chute immediately after the accident, this shows that the deceased had cleared the chute immediately prior thereto. This does not follow as of course, because these accumulations of

Mar. 1908]

Opinion Per MOUNT, J.

shingles were not of constant occurrence. They occurred several times during the day. They were visible and could have been seen as readily as any other object. Deceased had worked about thirty minutes after his midnight meal. No swamp was noticed prior to this time. When a swamp was pushed down, there must have been some evidence of that fact which would have been known or heard by the packer below, even though he might have been working at another bin at that time. There was no evidence of any of these facts tending to show that there was a swamp of shingles on the chute at the time of the accident.

Before it can be assumed that the clothing of the deceased came in contact with the clamp prior to his death, some fact must be made to appear which shows a duty to get near the clamp. The only reason offered is that there was a swamp of shingles in the chute at the time. This reason fails in this case because it is not shown that there was any such swamp, or any circumstance indicating a swamp at that time. The cause of death, therefore, is not shown to be the result of negligence on the part of the appellant, even though the appellant were held to be negligent in maintaining the clamp on the arbor of the shingle saw. There is no statutory liability in this case because the accident happened prior to the passage of the factory act of 1903 (Laws 1903, p. 40). The liability, if any, is a common law liability. The accident in this case might have happened in a number of ways for which the defendant was not responsible. For example, the deceased might have fallen on the saw by his own carelessness; he may have been stricken by dizziness; he may have cut his finger off and then fallen on the saw by reason thereof. A number of such theories are advanced. Any of these may be true. The theory advanced by the respondent may be true, but before that theory can be submitted to the jury the evidence must show a satisfactory foundation therefor, and not leave it to the jury to guess between causes for which the defendant would and would not be liable. *Peterson v. Union Iron Works*, ante p. 505, 93 Pac. 1077, and cases there cited.

Upon a careful consideration of all the evidence, we are convinced that there is no substantial basis for the claim that the deceased came in contact with the clamp prior to his death, or that there was any evidence to submit to the jury that the cause of death was due to negligence of the appellant. It was, therefore, the duty of the trial court to sustain the motion of appellant for a directed verdict. The judgment must therefore be reversed, and the cause dismissed.

HADLEY, C. J., CROW, ROOT, and RUDKIN, JJ., concur.

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[No. 6910. Decided March 12, 1908.]

EVA C. GRAVES, *Appellant*, v. NORRIS N. GRAVES  
*Respondent*.<sup>1</sup>

HUSBAND AND WIFE—COMMUNITY PROPERTY—ORAL AGREEMENT—FRAUDS, STATUTE OF. An oral agreement between husband and wife that real property thereafter acquired by either should be the separate property of such party, is void and does not change its community character, in view of Bal. Code, § 4490 making the same community property, and Bal. Code, § 4517, providing that conveyances of any interest in real estate shall be by deed.

SAME—EVIDENCE OF AGREEMENT—SUFFICIENCY. The evidence is insufficient to show an agreement that lots acquired by the husband were to be held as his separate property, where the wife flatly contradicts his testimony to that effect.

ADVERSE POSSESSION—HOSTILE CHARACTER—TENANTS IN COMMON—DIVORCED HUSBAND AND WIFE—EVIDENCE—SUFFICIENCY. There is no sufficient evidence of a holding of real estate by a husband adversely to his divorced wife, so as to make the same separate instead of community property, where it appears that in his action for a divorce no mention was made of the property, the wife having at that time on file her community property claim to the same, to the knowledge of the husband; since the decree of divorce left them tenants in common, and possession and receipt of rents and payment of taxes by him thereafter for ten years, without communication with his cotenant, will not constitute adverse possession.

<sup>1</sup>Reported in 94 Pac. 481.

Mar. 1908]

Opinion Per MOUNT, J.

EQUITY—LACHES—TENANCY IN COMMON—PARTITION. An action by a divorced wife for partition of community property, in possession of the husband as a tenant in common, is not barred by laches, where the husband had collected rents and paid taxes for thirteen years, and there had been no accounting and no improvements made since the divorce.

Crow, J., dissenting.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered July 16, 1907, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action of partition. Reversed.

*Merritt, Oswald & Merritt*, for appellant.

*A. E. Barnes*, for respondent.

MOUNT, J.—This appeal is from a judgment in favor of respondent in an action brought by the appellant for partition of certain real estate in Spokane. The complaint alleges, that the appellant and respondent are the owners of lots 23 and 24, in block 23, Sanders' addition to Spokane; that respondent has collected rents since April, 1893, and has not accounted therefor; that the property cannot be divided without prejudice thereto; and prays for a sale and division of the proceeds. The answer of the respondent denies these allegations, and pleads three alleged separate affirmative defenses. The substance of each of these defenses is the same and substantially as follows: That in the year 1888 the appellant and respondent were husband and wife, living in the city of Spokane in this state; that they then entered into an agreement by the terms of which there should be no community property of the parties, but that all property which they then owned, or might thereafter acquire, should be held as separate property of the one acquiring the same; that in pursuance of this agreement, the parties hereto purchased four lots in block 23 above mentioned, two of which lots were taken in the name of Mrs. Graves and the two lots in question taken in the name

of the respondent; that thereafter the appellant, Mrs. Graves, sold the two lots standing in her name and retained the proceeds thereof; that respondent kept the lots now in dispute, and has ever since been in the open, notorious, and adverse possession thereof, claiming the same as his sole and separate property; that thereafter, in the year 1889, Mrs. Graves abandoned respondent and has not lived with him since, and later, in the same year, brought an action for divorce against respondent in Spokane county, which action, after trial, was dismissed; that on September 9, 1891, Mrs. Graves executed and recorded in Spokane county a claim of her community right to the lots in question; that in the year 1893 respondent brought an action for divorce in Spokane county against appellant; that she did not appear in said action or defend the same, and that a decree of divorce was granted to the respondent; that more than ten years have elapsed since the decree of divorce was granted, and that respondent has ever since been in the open and adverse possession of the lots, paying taxes and claiming the property as his separate property to the knowledge of appellant; that appellant's claim is barred by reason thereof, and appellant is therefore estopped by reason of laches to claim any interest in the lots.

The appellant, for reply to this answer, admitted the marriage relations as alleged, that the property was acquired during coverture, by community funds, that in 1891 she filed a claim of community interest, that respondent has been in possession of the lots ever since that time; admitted the divorce proceedings; and denied all the other allegations of the affirmative answer. On these issues the cause was tried to the court without a jury. The court made findings substantially as set out in the defenses above. The trial court found as a fact that, in the year 1888, an oral agreement was entered into between appellant and respondent, to the effect that they were to keep their property separate, and that since that time they have done so.

It was not claimed by the respondent that there was any written agreement, or that any of their property was passed

Mar. 1908]

Opinion Per MOUNT, J.

by deed from one to the other, and it is conceded that the property in dispute was acquired and improved by community funds earned after marriage. The statute makes such property community property. Bal. Code, § 4490 (P. C. § 3876). An oral agreement that such property might be held as separate property by one of the spouses would be in the face of this statute and also another statute which provides that all conveyances of real estate or any interest therein shall be by deed. Bal. Code, § 4517 (P. C. § 4435). *Churchill v. Stephenson*, 14 Wash. 620, 45 Pac. 28; *Nichols v. Oppermann*, 6 Wash. 618, 34 Pac. 162; *Sherlock v. Denny*, 28 Wash. 170, 68 Pac. 452. If such agreement was made as found, it was therefore void, and did not change the character which the law gave to the property.

The trial court, at the close of the evidence, rendered an oral opinion which is contained in the record. From this opinion we are informed that the fact of this oral agreement was not considered for the purpose of determining the character of the property as separate or community, but was considered only for the purpose of showing notice to the appellant that the respondent was holding the property adversely to her. Assuming that the fact of this agreement might be considered for the purpose stated, we are of the opinion that the evidence is not sufficient to support the finding. The respondent testified that such an agreement was made. The appellant flatly denied it. The respondent also testified that in the state of Minnesota, prior to coming to the state of Washington, he sold a farm and gave most of the money to his wife. He also testified that when they came to this state they acquired a tract of land on Pleasant Prairie, in Spokane county, and afterwards sold it for something like \$20 in money and a sewing machine; that he took the \$20 and his wife took the sewing machine as a division of the proceeds. He also testified that his wife acquired the title to two lots adjoining the ones in question, and sold them and retained the proceeds which she afterwards invested in other lots which were sold for \$2,400, all of

which she kept as her individual money. The appellant admitted that she received some money from the sale of the Minnesota land, and that she received the sewing machine mentioned, but denied that she received the same by virtue of any separate property agreement. She also admitted that she purchased and received the benefit of the two lots adjoining the lots in question. She testified that, in addition to doing her own housework and caring for her children, she went out to work for neighbors by the day to help earn her living; that she purchased these two lots by such work from a kindly disposed neighbor, and that title was not taken in her own name but was held by this neighbor as trustee for her; that she afterwards sold the lots and reinvested the money and again sold and obtained the amount stated. There are in these facts probably some slight circumstances which might lend color to the view that there was an agreement that each should hold his property separately. But there is not enough, we think, in either these or other slight circumstances to base the finding of fact upon, especially when we consider the reasonableness of her explanation.

We do not think the evidence was sufficient to base a finding of adverse holding or laches upon. After the parties had ceased to live together the appellant, in the year 1889, brought an action for divorce against her husband. This property was involved, but what claims were then made do not appear. At any rate the action was dismissed because neither party showed cause for divorce. Both parties were asking for a decree, she upon the ground of cruelty and he upon the ground of abandonment. Soon after this time appellant left Spokane and has not lived there since. At the time she left Spokane, she had three children by respondent. Two of them afterwards died. Respondent contributed nothing to their support, and in no way assisted her either with the living or the dead, though he was requested to do so. In 1891 appellant filed of record her community claim against these lots. Thereafter, in 1893, the respondent brought an action in

Mar. 1908]

Opinion Per MOUNT, J.

Spokane county for divorce from his wife, but the complaint made no mention of the lots in question. The appellant did not appear in that action, and the decree of divorce was rendered, but no disposition was made of the property. At that time the appellant's community claim was on file in the office of the auditor of Spokane county, and the respondent knew of this. We think these facts fail to show an adverse holding by respondent against appellant. Respondent knew that the appellant was claiming her community interest. After such knowledge he brought an action for divorce against her. Had he desired to put an end to her claim he could have done so in the divorce action. He chose to obtain a divorce without any disposition of the community property. The decree therefore left them tenants in common of that property. *Ambrose v. Moore*, 46 Wash. 463, 90 Pac. 588. It is true she has made no effort to enforce her interest in the property since that time, and it is also true that he has collected the rents and paid the taxes, but there was no communication between the parties until about 1906, when an effort was made by the respondent to purchase the interest of appellant and, not being able to agree upon the price, the respondent then notified the appellant that she had no interest in the lots, and then the appellant brought this action. There can be no doubt that, during all the years since the divorce was granted in 1893, the property was joint property, and has been held by the respondent who was a cotenant with the appellant. The general rule in regard to adverse possession by one cotenant against another is stated in 1 Cyc. 1071, as follows:

"The entry and possession of land under the common title by one cotenant will not be presumed to be adverse to the others, but will ordinarily be held to be for the benefit of all."

In *Cox v. Tompkinson*, 39 Wash. 70, 80 Pac. 1005, we said:

"As the possession of land, held by a common title by one tenant in common, does not imply hostility, as does possession of a stranger to the title, stronger evidence is required to

show an adverse holding by a tenant in common than by a stranger, but the evidence need not differ in kind. Actual verbal or written notice is not necessary to start the statute running in such a case. If there be outward acts of exclusive ownership by the tenant in possession, of such a nature as to preclude the idea of a joint ownership, brought home to the cotenant, or of so open and public a character that a reasonable man would discover it, it is sufficient."

In this case the outward act of ownership consisted in possession, the collection of rents, and the payment of taxes by the respondent.

"The mere receipt and retention by one cotenant in possession of all the rents and profits does not of itself constitute an adverse possession, and will not ripen into title as against the others, though continued for the statutory period." 1 Cyc. 1076.

The property appears to have been improved property, consisting of two dwelling houses. It was not shown that the rents and profits do not meet the taxes and other necessary expenses, or that respondent had refused to account for rents, or that appellant had ever requested an accounting. In fact, the appellant appears to have made her home in places distant from Spokane, and had no communication with respondent from 1898 until about 1906. We think she had a right to assume that the rents would meet all the expenses and that the respondent was holding the property as cotenant, because there were no outward acts which would put her on notice of an adverse claim. We do not think the appellant was guilty of laches. The record shows no improvements to have been made on the property since the separation of appellant and respondent. There has been no change of condition and no platting or mortgages or sales of any part of the property, as was the case in *Cox v. Tompkinson*, *supra*.

Upon a consideration of all the facts in the case, we think the appellant is entitled to a division of the property in question. The judgment is therefore reversed, and the cause remanded to the lower court with directions to enter a judg-

Mar. 1908]

Statement of Case.

ment for a division of the property, or in case an equal division cannot be made, that the property be ordered sold and the proceeds divided equally.

HADLEY, C. J., FULLERTON, and ROOT, JJ., concur.

DUNBAR and RUDKIN, JJ., took no part.

Crow, J. (dissenting)—I am of the opinion that the facts show there was an ouster of appellant by respondent, her tenant in common, that he has shown title in himself by adverse possession, and that appellant has been guilty of unexplained and inexcusable laches. The judgment should be affirmed, and I therefore dissent.

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[No. 7096. Decided March 12, 1908.]

THE STATE OF WASHINGTON, *on the Relation of Sofia Malvina Korsstrom, Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY, *Respondent*.<sup>1</sup>

APPEAL—FINALITY OF JUDGMENT—REFUSAL TO DISMISS. An order refusing a voluntary dismissal of an action is not appealable as a final order, but may be reviewed on appeal from the final judgment.

PROHIBITION—REMEDY BY APPEAL. Prohibition does not lie to prevent the trial of a cause after erroneously refusing to grant a voluntary dismissal; since there is an adequate remedy by appeal.

Application filed in the supreme court November 16, 1907, for a writ of prohibition to restrain the superior court for King county, Albertson, J., from further proceeding with the trial of a cause after denying a motion to dismiss the same. Writ denied.

W. E. Crews, W. H. Bard, and James E. Fenton, for relator.

Chas. E. Patterson, for respondent.

<sup>1</sup>Reported in 94 Pac. 472.

MOUNT, J.—This is an application for a writ to prohibit the respondent judge from proceeding with the trial of a case. It appears that the relator brought an action in the lower court, alleging ownership of certain real and personal property by reason of being the only heir at law of a deceased brother. The complaint prayed for the possession of the property, and also for a decree adjudging a certain will and all proceedings thereunder to be void. Numerous parties, to whom property had been sold by the executors under the will, were made parties defendant in the action. The executors of the will of the deceased brother of relator appeared and answered the complaint, admitting certain allegations of the complaint and denying all the others, and also alleged several affirmative defenses. Thereupon the relator moved the court for a voluntary dismissal of the action as to all the defendants who had not appeared. An order to that effect was entered by the court. Thereupon the plaintiff, relator here, moved for a dismissal of the action as to the defendants who had answered. This motion was heard by the court and denied. Thereupon the plaintiff filed with the clerk of the court a dismissal and voluntary nonsuit of the action. The judge afterwards, upon motion of the defendants, was about to set the cause for trial upon the issues made. This application is to prohibit the court from proceeding with the trial of the cause.

It is clear that the order refusing to dismiss the case is not a final order. *State ex rel. Smith v. Superior Court*, 47 Wash. 508, 92 Pac. 349. It is also clear that the refusal of the court to dismiss the case may be reviewed upon appeal from the final judgment when entered. *Washington Nat. Bldg. etc. Ass'n v. Saunders*, 24 Wash. 321, 64 Pac. 546; *Gray v. Granger*, ante p. 442, 93 Pac. 912.

In the case of *State ex rel. Miller v. Superior Court*, 40 Wash. 555, 82 Pac. 877, 111 Am. St. 925, we held that the writ of prohibition does not lie to prevent the trial court from proceeding to try a case, although it may be without juris-

Mar. 1908]

Statement of Case.

diction, because in such cases the party aggrieved has an adequate remedy by appeal; and we also held in the same case that the adequacy of the remedy by appeal is the true test in all cases. We also there held that the delay or expense incident to the appeal does not affect the adequacy of the remedy. There is nothing in this application to take the case out of the rules stated in the cases above referred to.

The writ must therefore be denied.

HADLEY, C. J., CROW, and FULLERTON, JJ., concur.

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[No. 6870. Decided March 13, 1908.]

A. W. OWEN, *Respondent*, v. O. B. CASEY *et al.*, *Appellants*.<sup>1</sup>

APPEAL—RECORD—STATEMENT OF FACTS—TIME FOR FILING. A statement of facts, not filed within the ninety days prescribed by Bal. Code, § 5062, will be struck out, as the time cannot be extended beyond that period.

AGRICULTURE—LIENS—DEFENSES—PLEADING. In an action to foreclose a lien for labor in clearing land, a counterclaim for damages by reason of failure to complete the work in time for the crop of 1906 is demurrable, when the contract did not require the work to be done within that time.

ARBITRATION AND AWARD—PLEADING—SUFFICIENCY. An affirmative defense of settlement by arbitration is demurrable where it fails to allege any written agreement for arbitration, the filing of any award, or any approval of the same by the court.

AGRICULTURE—LIENS—LEASEHOLD INTEREST. A lien for labor in clearing land attaches against a leasehold estate.

Appeal from a judgment of the superior court for Adams county, Warren, J., entered October 5, 1906, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a laborer's lien. Affirmed.

<sup>1</sup>Reported in 94 Pac. 473.

*O. R. Holcomb*, for appellants.

*Lovell & Davis*, for respondent.

CROW, J.—This action was commenced by A. W. Owen against O. B. Casey and P. H. Casey, to foreclose a lien for labor in clearing certain land on which the defendants held a leasehold estate. After denying the allegations of the complaint, the defendants pleaded two affirmative defenses, to which demurrers were sustained. After hearing the evidence, the trial court entered a decree in favor of the plaintiff, from which the defendants have appealed.

The respondent has moved to strike the statement of facts, for the reason that it was not filed and served within ninety days after the entry of the decree, or the entry of the order overruling appellants' motion for a new trial. The record shows that the decree was entered October 1, 1906; that the order overruling the motion for a new trial was entered February 1, 1907, and that the proposed statement of facts was filed and served June 10, 1907. Although a written stipulation in the record purports to extend appellants' time until June 10, 1907, the statement must nevertheless be stricken as, under Bal. Code, § 5062 (P. C. § 788), the time cannot be extended beyond sixty additional days or ninety days in all, either by order of court or stipulation of the parties. *Loos v. Rondema*, 10 Wash. 164, 38 Pac. 1012; *State v. Seaton*, 26 Wash. 305, 66 Pac. 397.

The statement being stricken, the only questions we can consider are the appellants' contentions that the court erred in sustaining the demurrers to the affirmative answers, and that the respondent is not entitled to foreclose a lien on a leasehold estate. By their first affirmative answer the appellants attempted to plead a counterclaim for damages sustained by them by reason of the respondent's failure to complete the work in sufficient time to enable appellants to raise a crop from the land in the year 1906. The contract pleaded neither stipulated nor contemplated that the land was to be ready

Mar. 1908]

Syllabus.

for crop in 1906, but shows that the work was to be done within a reasonable time. The alleged damages did not, if sustained, proximately or necessarily result from any act or negligence of the respondent. The only evidence appellants could have introduced under this affirmative answer would have been admissible under their general denials, and we fail to see how any prejudicial error was committed in sustaining the demurrer to the first affirmative defense. By the second affirmative defense the appellants attempted to plead a former settlement and adjudication by arbitration, but failed to allege any written agreement for arbitration, any award filed with the clerk of the superior court, or any approval of the same by the court. The demurrer to this defense was properly sustained. A lien for labor may attach to, and be enforced against, a leasehold estate. *Miles Co. v. Gordon*, 8 Wash. 442, 36 Pac. 265.

The statement of facts being stricken, we cannot review the evidence. The judgment is affirmed.

HADLEY, C. J., MOUNT, and FULLERTON, JJ., concur.

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[No. 6751. Decided March 17, 1908.]

INLAND EMPIRE RAILWAY COMPANY, *Respondent*, v.  
HELEN M. MCKINLEY *et al.*, *Appellants*.<sup>1</sup>

EMINENT DOMAIN—DAMAGES—TO LANDS NOT TAKEN—SPECIAL FINDING—EFFECT. Upon an award of damages to land by the erection of a dam, depriving the owner of the benefit of a fall of six feet causing a swift current through his land, a special finding of the jury that the current was of no value as a water power for purposes of irrigating lands not taken, is conclusive upon the question as to the depreciation in value of the lands sought to be irrigated, where the issue was as to whether such current could be utilized for that purpose; and it was accordingly not error to exclude evidence of the depreciation in the value of the lands not taken which were to be irrigated.

<sup>1</sup>Reported in 94 Pac. 644.

SAME—WATER POWER APPURTENANT TO LANDS. Upon condemnation of lands to be overflowed by the erection of a dam, which would deprive the owner of a swift current through his land valuable as a water power, the current is an appurtenant to the lands actually taken, for which damages are to be assessed with the land, and is not an appurtenant to other land not taken where the power had not been developed and made appurtenant to such other lands.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered October 10, 1906, upon the verdict of a jury awarding damages in a condemnation proceeding. Affirmed.

*Coovert & Stapleton*, for appellants.

*Graves, Kizer & Graves*, for respondent.

MOUNT, J.—This appeal is taken from an award of damages in condemnation. The jury assessed the defendants' damages at \$2,250. The defendants appeal from this award.

The facts in the case are in substance as follows: Appellants own about thirty-seven acres of land bordering upon the Spokane river. The respondent proposes to construct a dam sixty feet in height across the river above the appellants' premises. This dam will cause the overflow of about sixteen acres of the appellants' land. The balance rises high above the river and will not be affected by the overflow. The river has a fall of about six feet between the upper and lower boundaries of appellants' land, making a swift current. It is conceded that the erection of the dam will destroy this current. It was claimed by appellants at the trial that this fall affords a valuable power for commercial purposes, and especially for the purpose of pumping water for irrigating the high land. Evidence was submitted to the jury to show the value of the water power as such, and the jury were instructed that they should consider the value of the power as a part of the value of the land taken. A special finding was requested as to the value of this water power, and the jury found that it was of no value. The appellants offered evidence to show the amount

Mar. 1908]

Opinion Per MOUNT, J.

of depreciation in value of the land not taken by reason of the destruction of this power, which it is claimed is a most economical means of irrigating such lands. The court excluded this evidence, and this presents the question on this appeal.

It is not claimed by the appellants that the land not taken has ever been irrigated, or that this land is, or will be, damaged in any way by the respondent, except by the destruction of the current in the river, and it is claimed that this takes away all means of pumping water on the remaining land and thus destroys the means of cheaply irrigating such land. The finding of the jury that this alleged water power has no value is, we think, conclusive of the whole question, because, in order to find that the power was of no value, the jury must have found that it could not be utilized as a power. If such power cannot be utilized, then the balance of the appellants' lands has not suffered by reason of the destruction of the alleged power. The utility of this alleged power was one of the principal issues in the case, and the facts were gone into fully and the jury were properly instructed thereon. No exceptions were taken to these instructions, and no error is predicated thereon at this time. It follows, therefore, as one of the established facts in the case, that the alleged power is of no value.

But conceding that the current in the river as it runs past the appellants' lands may be developed into a valuable power, by which appellants' lands may be irrigated, in that event the power is an appurtenant of the land actually taken. It is not an appurtenant to other lands, because it has never been developed and made an appurtenant to the lands not taken. Therefore, when it is taken with the lands to which it is appurtenant, its value must be assessed with the value of the lands taken. The court so instructed the jury. A different question might arise if the power were developed and employed as an appurtenant to the lands not taken. But such is not the fact, and that is not the question presented here.

We find no error in the record. The judgment must therefore be affirmed.

HADLEY, C. J., CROW, FULLERTON, and ROOT, JJ., concur.

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[No. 7150. Decided March 17, 1908.]

DOUGLAS ROSS *et al.*, *Appellants*, v. DAVID KAUFMAN,  
*Respondent*.<sup>1</sup>

FRAUDS, STATUTE OF—BROKERS—EMPLOYMENT—CONTRACT IN WRITING—MEMORANDUM—SUFFICIENCY. Under Laws 1905, p. 110, requiring a contract with a broker for commissions on the sale of real estate, or a memorandum thereof, to be in writing, a note of instructions to the agent containing none of the terms of the contract of employment is insufficient as a memorandum under the statute.

CONSTITUTIONAL LAW—CLASS LEGISLATION—RIGHT TO CONTRACT—BROKERS. Laws 1905, p. 110, requiring a broker's contract to be in writing is not unconstitutional as class legislation, or as an unwarranted interference with the right to contract.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered October 14, 1907, upon sustaining a demurrer to the complaint, in an action to recover commissions, upon a sale of real estate. Affirmed.

*Jay C. Allen*, for appellants.

*Chas. M. Fouts* and *Kitt Gould*, for respondent.

MOUNT, J.—This action was brought by the appellants to recover commissions upon sale of real estate. The trial court sustained a demurrer to the amended complaint. Plaintiffs refused to amend further, and the action was dismissed.

The facts are essentially the same as in the case of *Keith v. Smith*, 46 Wash. 131, 89 Pac. 473, and must be affirmed for the reasons stated in that case, which was followed in

<sup>1</sup>Reported in 94 Pac. 641.

Mar. 1908]

Syllabus.

*Briggs v. Bounds*, ante p. 579, 94 Pac. 101. The appellants argue here that the act of 1905, Laws 1905, p. 110, which requires contracts of this kind to be in writing, is unconstitutional because, first, it is class legislation and, second, it is an unwarranted interference with the rights of contract. Neither of these reasons requires extended notice. All class legislation is not prohibited by the constitution. *Fitch v. Applegate*, 24 Wash. 25, 64 Pac. 147. This statute does not affect the right of contract, further than to require certain contracts to be in writing, and this is without doubt within the legislative power. Otherwise the legislature could require no contract to be in writing. We think the act is constitutional.

The judgment must therefore be affirmed.

HADLEY, C. J., CROW, FULLERTON, and ROOT, JJ., concur.

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[No. 7153. Decided March 17, 1908.]

W. J. SHIELDS, *Respondent*, v. DOTY LUMBER & SHINGLE  
COMPANY, *Appellant*.<sup>1</sup>

LOGS AND LOGGING—BOOMS—DAMAGES—TRIAL—VERDICT. In an action for the conversion of logs cut into lumber by defendant, and for damages from obstructing a stream with a boom, whereby a portion of plaintiff's logs not cut up were lost to the plaintiff, it is immaterial whether the logs were wrongfully cut up or were lost by the wrongful acts of the defendant; hence a verdict for the plaintiff for the total damages by reason of logs lost and converted is not excessive, although the proof did not show what amount was cut up and converted.

TROVER AND CONVERSION—DEFENSES—PERMISSION TO CUT LOGS—INSTRUCTIONS. In an action for the wrongful conversion of logs, it is harmless error to instruct that the burden of proof was upon the defendant to show that logs, admittedly taken and cut, were cut by permission of the plaintiff, where the defendant did not claim to have paid for them, and their value was undisputed.

<sup>1</sup>Reported in 94 Pac. 644.

**SAME—MEASURE OF DAMAGES.** The measure of damages for logs converted or lost by the wrongful acts of the defendant is the value of the logs.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered July 6, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for the conversion of sawlogs. Affirmed.

*Forney & Ponder and Geo. Dysart*, for appellant.

*Elliott & Hamaker*, for respondent.

MOUNT, J.—The respondent brought this action against the appellant to recover the value of certain sawlogs. The case was tried to the court and a jury, and resulted in a verdict and judgment for the plaintiff. Defendant appeals.

The facts are as follows: The respondent, in the summer of 1906, cut a number of sawlogs which were placed in the Chehalis river, a stream navigable for sawlogs during the rainy season. These logs were to be delivered to the Cain Lumber Company, about twelve miles down from where respondent placed them in the river. Between these two points the appellant maintained a sawmill and two shingle mills. At each of these mills appellant maintained booms in the river. These booms were so arranged that they could be readily swung clear across the river. In the month of October, 1906, when the first freshet made the river suitable for driving the logs down to the Cain Lumber Company, respondent notified the appellant that he desired to drive the logs down past these booms. Appellant did not open its booms to allow respondent's logs to pass through. As a result the logs lodged upon the booms. A few days later respondent gave appellant written notice to pass the logs through the booms, which appellant failed to do. About a month later extraordinary high water came and carried out the booms and logs, which were lost to the respondent. In the meantime, while the logs were lodged in the boom at appellant's sawmill, the appellant ap-

Mar. 1908]

Opinion Per MOUNT, J.

propriated certain of the logs and cut them into lumber. If the logs had been allowed to pass the appellant's booms, they would have been delivered safely to the Cain Lumber Company, where the contract price was \$5 per thousand.

Respondent in his complaint alleged three causes of action. The first cause was for conversion of 452,261 feet of sawlogs at the value of \$5 per thousand feet, amounting to \$2,261.30. The second cause was for loss of logs caused by the alleged wrongful acts of appellant in obstructing the Chehalis river by booms and a dam, causing a loss of 54,800 feet of logs of the value of \$5 per thousand feet, amounting to \$274. The third cause was for sixty-three days' time lost in attempting to drive logs past the obstructions wrongfully maintained by appellant. The amount of this loss of time was alleged at \$315. The answer put in issue all the facts alleged in the complaint. Upon the trial the jury returned a verdict for the plaintiff for \$2,750.30. Appellant moved for a new trial upon all the statutory grounds. At the hearing of this motion, the trial court concluded that the verdict was excessive in the sum of \$350.30, and required a remission of this amount. The remission was made, and judgment was thereupon entered for \$2,400 in favor of the plaintiff.

Appellant argues now that the judgment is still excessive, for the reason that the evidence shows that the appellant converted to its own use only 128,000 feet of the logs, which, at \$5 per thousand feet, amounts to \$640; and, allowing the full amount claimed on the second and third causes of action, the judgment could not be more than \$1,229. It is true the respondent's evidence is somewhat indefinite as to the exact number of logs which appellant took from the river and cut into lumber. The respondent did not know, he had no means of knowing, and was unable to state the number of logs thus appropriated by the appellant. But the evidence shows that the respondent was unable to find, or account for, about the number of logs he alleged in his complaint were converted by the appellant. The appellant admitted that it took 128,000

feet. The question of fact as to how much was converted by the appellant was, therefore, for the jury. Upon reading the evidence, we are impressed with the fact that there was no substantial dispute in the amount of logs the respondent placed in the river, viz., 507,162 feet, and that these logs were lost by reason of the wrongful obstruction of the river by the appellant, with the exception of about 20,000 feet. Whether the appellant converted the logs into lumber or allowed them to float away makes no material difference, because in either event the appellant was liable to respondent for the value of all the logs so lost. It is conceded that the value was \$5 per thousand feet, and it is conclusively proven that all the logs were lost to respondent except about 20,000 feet, which were caught by the Cain Lumber Company. We are convinced, therefore, that the judgment is not excessive.

Appellant insists that the court erred in instructing the jury to the effect that the burden of proof was upon the appellant to show that respondent agreed to let appellant take the logs which appellant admittedly took from the river. If this instruction was error, it was harmless because appellant does not claim to have paid for these logs or to have tendered the amount due therefor. Its liability was the same whether it took the logs by agreement or wrongfully. The real question before the jury was whether the respondent's loss was occasioned by the wrongful acts of the appellant. Having so found, the measure of damage was the value of the logs lost, irrespective of who thereafter made use of the logs.

We find no error in the record, and the judgment must therefore be affirmed.

HADLEY, C. J., CROW, FULLERTON, and ROOT, JJ., concur.

Mar. 1908]

Opinion Per MOUNT, J.

[No. 7154. Decided March 17, 1908.]

THE STATE OF WASHINGTON, *Respondent*, v. E. G.THOMPSON, *Appellant*.<sup>1</sup>

PHYSICIANS AND SURGEONS — PRACTICING DENTISTRY — CRIMINAL LAW—EVIDENCE—SUFFICIENCY. The evidence is sufficient to sustain a conviction for practicing dentistry without a license where it appears that defendant, who had no license, made a new mouth plate for the prosecuting witness at the agreed price of \$5, and in order to take an impression and fit the plate, extracted a tooth, although no independent charge was made for extracting the tooth; since taking the impression was in itself the practicing of dentistry.

SAME—REQUIREMENT OF LICENSE — CONSTITUTIONAL LAW. Bal. Code, § 3032 prohibiting the practice of dentistry without a license is not unconstitutional.

Appeal from a judgment of the superior court for King county, Morris, J., entered April 23, 1907, upon a trial and conviction of practicing dentistry without a license. Affirmed.

*John R. Parker and Edwin J. Brown*, for appellant.

*Kenneth Mackintosh*, for respondent.

MOUNT, J.—The appellant was convicted of practicing dentistry for a fee without first having procured a license therefor. He appeals from a judgment imposing upon him a fine of \$50.

He argues that the evidence was insufficient to show that he practiced dentistry or that he received a fee therefor. The evidence shows without dispute, that the appellant maintained a dental office in Seattle and agreed to make a new mouth plate for the prosecuting witness for the price of \$5; that in order to fit the plate it was necessary to extract a tooth. Appellant extracted the tooth and took an impression for the plate and collected \$3 on account. Subsequently the plate

<sup>1</sup>Reported in 94 Pac. 667.

was made, but the prosecuting witness did not return for it. It was conceded that appellant at the time did not have a license authorizing him to practice dentistry in the state, as required by the dental act. Appellant stated to the prosecuting witness, at the time the tooth was extracted, that he made no charge for extracting the same. These acts of the appellant clearly constituted the practice of dentistry within the meaning of Bal. Code, §3032. While appellant made no independent charge for extracting the tooth, that was a necessary part of the work in fitting the plate to the mouth, because the plate could not be fitted or the impression taken without the removal of the tooth. The charge therefore covered that as much as any other part of the work. But the taking of the impression was itself practicing dentistry, because that act was for the purpose of correcting a malformation of the jaw, by inserting a tooth in place of the one removed. The evidence was clearly sufficient. *State v. Sexton*, 37 Wash. 110, 79 Pac. 634.

Appellant also argues that the act is unconstitutional. We have heretofore, in *State ex rel. Smith v. Board of Dental Examiners*, 31 Wash. 492, 72 Pac. 110, and *In re Thompson*, 36 Wash. 377, 78 Pac. 899, passed upon all the questions presented here, and we are satisfied with the conclusions there reached. See, also, *State v. Sexton*, *supra*; *State v. Brown*, 37 Wash. 106, 79 Pac. 638.

There is no error in the record, and the judgment must therefore be affirmed.

HADLEY, C. J., CROW, FULLERTON, and ROOT, JJ., concur.

Mar. 1908]

Opinion Per CROW, J.

[No. 6719. Decided March 17, 1908.]

**J. F. CANADY, Respondent, v. A. H. KNOX et al., Appellants.**<sup>1</sup>

**CONTRACTS—CONSTRUCTION—RESTRICTION ON OCCUPATION—BREACH OF CONDITIONS.** A contract for the sale of a butchering business, which stipulated that the vendor will not enter into such business in the town of A for a period of three years, nor kill any animal except for his private use, is violated where the vendor helped to kill animals for sale in such town and drove a delivery wagon for a rival concern within the stipulated period and territory.

**APPEAL—DECISION—LAW OF CASE.** A decision of the supreme court on a former appeal that the sum of \$2,000, stipulated to be paid on the violation of a contract not to enter into the butchering business, was stipulated damages and not a penalty, becomes the law of the case on a retrial, and fixes the damages upon a breach of the contract being shown.

Appeal from a judgment of the superior court for Lincoln county, Warren, J., entered December 19, 1906, in favor of the plaintiff, after discharging the jury at the close of the testimony, in an action on contract. Affirmed.

*Merritt, Oswald & Merritt*, for appellants.

*Dye & Reiter* and *Neal, Sessions & Myers*, for respondent.

Crow, J.—This action, which was commenced by J. F. Canady against A. H. Knox and Mrs. A. H. Knox, his wife, to recover liquidated damages for the breach of a contract, has heretofore been before this court, being reported in 43 Wash., at page 567, 86 Pac. 930, where a full statement of the pleadings and a copy of the written contract may be found. After the remittitur had been filed in the superior court, the cause came on for trial before the court and a jury. The plaintiff called various witnesses who gave testimony tending to show that shortly after the defendant Knox had sold his meat market, fixtures, business, and good will, to the

<sup>1</sup>Reported in 94 Pac. 652.

plaintiff, he commenced work in some capacity in a new meat market established in Almira; that he engaged in cutting meat therein; that he had killed stock for purposes other than his own private use; that he drove a butcher's delivery wagon to various points in and around Almira and peddled meat; that the market was conducted under the name of "Farmers Meat Market;" that it was advertised in a newspaper in the name of one Flynn; that defendant in substance told various witnesses he was going into the meat market business; that when he did so, plaintiff's business would amount to nothing; that Flynn had agreed to permit him to do business in his name, and that he was entitled to conduct a meat market in Almira if he wished to do so, without violating any of the terms of his contract. No evidence of the actual amount of damages sustained was offered, defendants' counsel stating that he understood there was no issue on that question, as this court had decided the same. The defendant himself was called by the plaintiff and testified as follows:

"Q. Did you participate in the butchering or killing of animals during that time, cattle or beef, hogs, sheep or anything of that nature that was sold through that shop? (the new market) . . . A. I helped kill a few. Q. Did you, during the time that shop was in operation, participate in or drive any wagons in selling meat in the country or otherwise? A. Yes, I drove a wagon in the country most of the time myself. Q. Did you sell meat from that wagon? A. Yes."

The plaintiff thereupon moved for judgment for \$2,000, liquidated damages, upon the ground that the defendant had admitted upon the witness stand facts constituting a violation of the contract upon his part. Before this motion was decided by the trial judge, defendants' attorney offered to prove by the defendant, upon cross-examination, the length of time the new business had been conducted; that the defendant drove a wagon for one Mr. Fynn; and that the plaintiff had sold his business previously purchased from the defendant. These offers were, upon the plaintiff's objection, refused. No further evidence being offered, the trial judge

Mar. 1908]

Opinion Per CROW, J.

discharged the jury and entered judgment in favor of the plaintiff for \$2,000 liquidated damages. The defendants have appealed.

It is contended that the trial judge erred in sustaining respondent's objection to the offers of evidence on cross-examination of appellant above mentioned. Apparently it was appellant's contention that he was working for Fynn and not for himself. The evidence offered by the cross-examination was immaterial and properly rejected. The written contract contains the following stipulation:

"That the party of the first part [appellant] agrees with the party of the second part [respondent] that he will not enter into the butcher business, nor kill any animals for the purpose of peddling or sale of any nature, only for his own private use in the town of Almira or adjacent territory."

His own evidence shows that he violated this agreement. He killed and butchered animals for sale in Almira, being for purposes other than his own private use. He had been engaged in the new market either as an employee or in some other capacity, and had also peddled meat in and near Almira, from a delivery wagon. The evident intention of the written contract was that the appellant should in no way compete with the respondent's business either himself personally or in any other manner, directly or indirectly. Such intent is shown by the one specified exception reserving to appellant the right to kill animals for his own private use. There would be no question of his having violated the contract even though he had been permitted to show that the new market was owned and operated by Flynn, and that he was Flynn's employee. He cites *Haley Grocery Co. v. Haley*, 8 Wash. 75, 35 Pac. 595, and insists, on the authority of that case, that by accepting employment from Flynn he did not violate his contract. In the *Haley* case the contract read:

"I undertake and agree with the Haley Grocery Company that within the period of three years from this date I will not engage in the business of wholesale or retail groceries, either in my own name or in that of another, or conduct or engage

in any such business for any other firm, person or corporation, with any share of the profits, or with any interest in the property, and with no secret or actual accounting or division of either property or profits, for my benefit, or for compensation regulated on the basis of profits or sales of property or stock."

This contract did not prohibit Haley from being employed in another grocery on a salary without further compensation. The only purpose was to prevent him from becoming personally interested in the profits of a rival business, either directly or indirectly. There is a marked difference between the Haley agreement and that of the appellant, who only reserved to himself the right to kill animals for his own private use. The fact that the respondent had disposed of the old meat market would not, if proven, have relieved appellant from liability. There is no evidence showing how much of the \$3,500 purchase price had been paid by respondent for the good will of appellant's former business. For aught that appears, such good will may have been the principal consideration. It is not contended that respondent disposed of the old market before appellant had violated the contract or before the new meat market was established.

Some contention is made by appellant to the effect that the \$2,000 named in the contract was a penalty, and that no actual damages had been shown. In our former opinion we disposed of this suggestion contrary to appellant's contention, and that decision has become the law of this case. The appellant at no time asked to introduce evidence in addition to that above mentioned. His own testimony sustained respondent's allegation that he had violated the contract. He and respondent had agreed on the stipulated damages for such violation, and the court properly directed a judgment in respondent's favor.

The judgment is affirmed.

HADLEY, C. J., MOUNT, ROOT, and FULLERTON, JJ., concur.

Mar. 1908]

Opinion Per CROW, J.

[No. 7014. Decided March 17, 1908.]

**W. B. PRESBY, *Appellant*, v. A. MELGARD, *Respondent*.<sup>1</sup>**

**CHattel Mortgages — PRIORITIES — APPLICATION OF PROCEEDS — BANKS AND BANKING—EVIDENCE—ADMISSIBILITY.** In an action by a second mortgagee of chattels to charge the first mortgagee, a banker, with sums received from the mortgagor which should have been applied to discharge the first mortgage, because (as alleged) proceeds of the mortgaged property, evidence on the part of the defendant is admissible to show that the sums received from the mortgagor were deposits derived in part from other sources than the mortgaged property, all made in one account, against which the mortgagor checked as a depositor.

**SAME—FAILURE OF SECOND MORTGAGEE TO OBJECT TO APPLICATION.** A banker, holding a first mortgage on a flock of sheep, their increase, and the clip of wool, upon which there is a second mortgage upon the sheep only, is not required to see that the proceeds of the wool, deposited in the bank by the mortgagor, is applied to discharge the first mortgage, where the mortgagor and second mortgagee had been partners, were both present when the mortgagor made the deposit and checked against the same, paying part of the proceeds to each mortgagee and part to a third person, the second mortgagee making no objection at the time, and where at the time of the deposit, the first mortgagee had sold an interest in, and was only part owner of, the bank.

Appeal from a judgment of the superior court for Klickitat county, McCredie, J., entered February 11, 1907, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action to recover the proceeds of a sale of personal property held under a chattel mortgage. Affirmed.

*Huntington & Wilson*, for appellant.

*Bennett & Sinnott*, for respondent.

CROW, J.—This action was commenced by W. B. Presby against A. Melgard, to recover the sum of \$500.13, proceeds

<sup>1</sup>Reported in 94 Pac. 641.

of the sale of certain personal property on which the plaintiff held a second mortgage lien and the defendant held a first mortgage lien. The plaintiff alleged that, prior to June 27, 1903, he and one A. W. Nelson were joint owners of eighteen hundred head of sheep; that they borrowed of the defendant, A. Melgard, the sum of \$2,500, giving him their personal note maturing June 27, 1904, secured by a chattel mortgage on the sheep, their increase, and the wool to be shorn; that the plaintiff sold his interest in the sheep to his co-owner, A. W. Nelson, who assumed the payment of the \$2,500 note, and as part payment for plaintiff's interest in the sheep, executed and delivered to plaintiff his note for \$1,000, dated July 23, 1903, due July 1, 1904, secured by a second chattel mortgage on the sheep, but not on their wool or increase; that the defendant at the time had actual notice of the sale to Nelson and of the second note and mortgage held by the plaintiff; that he had knowledge of the fact that the second mortgage did not cover the wool or increase; that plaintiff is still the owner of the second note and mortgage; that \$500.13 of the principal, with interest thereon, is unpaid, and due to plaintiff; that at divers times between December 8, 1903, and October 13, 1904, A. W. Nelson, with the knowledge and consent of the defendant but without plaintiff's knowledge or consent, disposed of certain mutton sheep covered by the mortgages, for sums amounting to \$804, which sums he turned over to the defendant; that certain of the sheep died, from which Nelson sold pelts for \$89.79, which sum he also turned over to defendant; that during the spring of 1904, there was shorn from the sheep covered by the mortgage a large amount of wool, which Nelson sold for \$1,269.10, paying the proceeds to defendant; that on October 24, 1904, the defendant requested Nelson to dispose of the remainder of the sheep, which he did, for the sum of \$2,891.25, paying the proceeds to the defendant; the total amount thus received by defendant through Nelson for the proceeds of the sheep, pelts, and wool, being \$5,054.14; that no portion thereof was

Mar. 1908]

Opinion Per CROW, J.

ever credited upon the note for \$2,500 held by the defendant and secured by his first mortgage, except \$550 credited May 24, 1904, and \$2,275.78 credited November 1, 1904, the latter sum being the remainder then due; that after these credits the sum of \$2,228.46 remained of the proceeds of the sheep, pelts, and wool which had been received by the defendant, and that after full payment of defendant's note, there should have remained in his hands more than sufficient funds to fully settle plaintiff's claim as second mortgagee.

The plaintiff's theory seems to be, that as the proceeds of the sale of the mortgaged property came into the possession and control of defendant, who had knowledge of plaintiff's second lien, the defendant should have applied to the payment of his prior note for \$2,500 and interest, first, all the proceeds of the sale of the wool upon which defendant held a lien but plaintiff held no lien, thus protecting plaintiff's mortgage on the sheep, and second, the proceeds of the sale of such other portions of the property as might be necessary to fully settle the remainder of the defendant's claim; that the defendant failed to do this, but permitted Nelson to divert the funds for other purposes; that the plaintiff thereby lost the security for his note to which he was entitled, and that the defendant is liable therefor.

The defendant, by his answer, in part alleged that he had been conducting a banking business at Goldendale, under the name of "Bank of Goldendale;" that on January 1, 1904, he took his brother into the banking business with him, which they thereafter conducted as partners under the same name; that Nelson did not pay the proceeds of the various sales to him, but from time to time deposited them in the bank of the partnership, to his own credit; that he checked upon his account, making payments to the plaintiff, the defendant, and other parties; that the plaintiff knew of the bank account and Nelson's method of transacting business; that he was present at the bank when the proceeds of the wool were disbursed by Nelson; that he assented to the disbursements then made, and

that the only business relations of defendant and his brother with Nelson upon which plaintiff bases his complaint were those of bankers and depositor, all of which the plaintiff knew. Findings were made in favor of the defendant, and the action was dismissed at the costs of plaintiff, who has appealed.

The trial court, over appellant's objection, admitted evidence showing numerous deposits of money by Nelson in the bank other than proceeds of the sales of the sheep, pelts, and wool. Appellant now insists that error was thereby committed; that although this case is in this court for trial *de novo*, the error complained of was prejudicial, as the court below considered such incompetent and immaterial evidence in making the findings of fact. One theory on which the appellant claims the respondent to be liable is that the proceeds of the sales made by Nelson were all delivered to respondent personally, who at the time knew the sources from which the money came, and should have so applied the same as to protect appellant's second mortgage lien. Undisputed evidence, however, shows that Nelson deposited in the bank money received by him from the sheep, pelts, wool, and other sources, receiving the credit therefor in a single running account, and checking against the same. If no money had been deposited other than that received from sales of the sheep, pelts, and wool, and if respondent only had been interested in the bank, it might possibly be contended that, instead of making ordinary bank deposits, Nelson was delivering the money into the custody and control of the respondent to be used in discharge of his mortgage lien and also of appellant's second mortgage lien. But if he made deposits of other funds in the same account, the situation would be entirely different. It was proper for the trial judge to admit the evidence of such other deposits as tending to show the true business relations between the parties. For the same purpose it was also proper to admit in evidence numerous checks drawn by Nelson in favor of respondent, appellant, and other parties. No prejudicial error was committed in receiving or rejecting evidence.

Mar. 1908]

Opinion Per CROW, J.

The other assignments of error are based upon the contention that the findings of fact are not sustained by the evidence, all of which we have carefully read and considered. Much conflict existed between the various witnesses in their testimony affecting material issues. The trial judge had the advantage of seeing the witnesses and hearing them testify. There is ample evidence in the record to sustain the findings made, which we will not disturb. The findings being sustained, the judgment must be sustained also.

It appeared that the respondent held a first mortgage lien on the wool, the sheep, and their increase, while appellant's second mortgage was a lien on the original flock of sheep only. Appellant contends that as the proceeds of sales of the wool and the lambs or increase came into respondent's possession, he should have credited the entire amount on his first note and mortgage; that he failed to do so, but knowingly permitted Nelson to divert the money to other purposes; that by reason of respondent's acts appellant lost his security, and respondent is liable. The equitable rule, that when one holds a first mortgage on property, a portion of which is covered by a second mortgage, the first mortgagee may be required to first exhaust that portion of the property covered by his lien not subject to the second mortgage, thus protecting the lien of the second mortgagee, need not be questioned. The trial court, however, found that, when the proceeds of the wool, subject only to respondent's lien, were disbursed, appellant, respondent, and Nelson were all present; that Nelson by check paid a portion of the money on respondent's first mortgage, another portion on other notes held by respondent, and a small amount on the claim of a third party, and that no objection was made by appellant to such disbursements, all of which were made with his knowledge and consent. It was further found that appellant had knowledge of, and consented to, all the dealings and transactions between Nelson and the respondent, pertaining to sales of the sheep, wool, and pelts. Although the evidence was conflicting, it was sufficient to sustain these findings.

There was no showing that respondent or the bank had agreed to receive and hold funds arising from the sales, as trustee or agent for appellant, or that they were authorized to apply the same on appellant's note. Appellant made no demand of the bank or Nelson for any such application of the money until just prior to the commencement of this action, at which time Nelson's bank account had been closed, his last check for \$205.37 having been issued to appellant and credited on his note on March 10, 1905, more than four months after Nelson had made the final sale of the sheep with appellant's consent, and had deposited the proceeds in the bank. Appellant testified that he had continual confidence in Nelson and trusted him. Under such circumstances it certainly was not the duty of respondent or the bank to refuse payment of Nelson's checks so that they might hold the funds for credit on appellant's note, which was not in the possession or control of either of them for collection or for any other purpose. They were in no position to have returned the note to Nelson had he paid it. The allegations of appellant's complaint and the undisputed evidence both show that the entire proceeds of the various sales of sheep, pelts, and wool, with the exception of \$50, were deposited long after January 1, 1904, at and after which time the bank ceased to be the individual property of respondent, but was owned and conducted by the partnership consisting of respondent and his brother. It was not the duty of the bank to apply Nelson's deposits upon appellant's note, and respondent cannot be held liable for its failure to do so.

The judgment is affirmed.

HADLEY, C. J., MOUNT, and FULLERTON, JJ., concur.

Mar. 1908]

Opinion Per Root, J.

[No. 7026. Decided March 17, 1908.]

PAUL WILLIAMS, *Respondent*, v. HILLMAN INVESTMENT  
COMPANY, *Appellant*.<sup>1</sup>

**VENDOR AND PURCHASER—FAILURE TO CONVEY—MEASURE OF DAMAGES.** The measure of damages for failure of a vendor to convey real estate sold, where the sale was induced by false representations of the vendor which the vendee had a right to rely upon, is the difference between the value of the property at the time of demand for a deed and the amount of the balance then due from the vendee.

Appeal from a judgment of the superior court for King county, Griffin, J., entered July 27, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Modified.

*Frederick R. Burch*, for appellant.

*Smith & Cole*, for respondent.

Root, J.—Defendant executed a contract for the sale of certain real estate to one Marguerite Foy, and subsequently executed a like contract for the same property to this plaintiff, and represented to him that Miss Foy had defaulted in her payments, that her contract had lapsed and was void, and that she was absent from the state. Plaintiff, believing and relying upon these representations, made payments monthly upon the property for about a year, and then tendered to the defendant the balance due upon his contract and demanded a deed to the premises. Defendant declined to furnish said deed, and claimed that he had been unable to secure from Miss Foy a release of her rights under her contract.

The trial court found that Miss Foy had been making her payments regularly as called for by her contract, and was living in the state, all of which was unknown to plaintiff, and that he had no means of ascertaining such facts. Defendant

<sup>1</sup>Reported in 94 Pac. 653.

offered to refund the plaintiff the money he had paid, together with legal interest thereupon, but the latter refused to receive the same, and brought this action to recover damages in the amount of the difference between the purchase price and the value of the property at the time he demanded a deed therefor, its value having enhanced since the contract of purchase was made. The trial court also found that the market value of the property, at the time the deed was demanded, was \$1,026.25, that the plaintiff had paid \$120, and that there was a balance of principal and interest due upon the contract of \$321.25. Upon these findings, the court concluded that the plaintiff was entitled to judgment against the defendant in the sum of \$120, with interest, and for the amount of the market value of the premises less the amount then due, said difference being \$775. Thereupon judgment was entered for said sums, and from this judgment the defendant appeals. No exceptions were taken to any of the findings.

The only question presented upon the appeal is that touching the correctness of the measure of damages and the amount of the judgment. Appellant maintains, (1) that respondent is entitled to recover only the amount of the money paid upon his contract together with legal interest; (2) that if this is not the correct measure of damages, then it should be the difference between the value of the property at the time the deed was demanded and the amount then due from respondent. It appearing that the appellant was guilty of misrepresentation, and that this misrepresentation had to do with facts within its own knowledge, but which were not and could not in the ordinary course of conduct be ascertained by the respondent, but which were well calculated to deceive and mislead a man of ordinary business prudence, we think that the measure of damages was the difference between the value of the property at the time the deed was demanded and the amount of the balance then due from respondent; that respondent had his choice of asking such damages or of receiving back his money with legal interest thereupon. In other words, the re-

Mar. 1908]

Opinion Per Curiam.

spondent, upon tendering to appellant the balance due upon his contract, was entitled to receive a conveyance of the property—to thereby acquire the property. Appellant being unable to convey to him the property, was, as a matter of right and justice, in duty bound to give him its equivalent, to wit, its value, \$1,026.25, less the amount which was yet due from respondent on the purchase price. The trial court, however, gave judgment not only for this amount, but also for the \$120 already paid, together with interest thereupon. This was erroneous, and was admitted so to be by respondent's attorneys in their brief. The judgment of the honorable superior court will be modified by reducing the recovery to the sum of \$775 with legal interest thereupon from the date of its entry, and in such amount the judgment is affirmed.

HADLEY, C. J., CROW, MOUNT, and FULLERTON, JJ., concur.

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[No. 6868. Decided December 13, 1907.]

THE STATE OF WASHINGTON, *Appellant*, v. W. K. WISEMAN,  
*Respondent*.<sup>1</sup>

Appeal from a judgment of the superior court for Benton county, Zent, J., entered May 13, 1907. Reversed.

*J. W. Callicotte*, for appellant.

PER CURIAM.—The respondent was prosecuted upon an information charging him with living in a state of adultery. A demurrer to the complaint was sustained, on the ground that the facts did not constitute the cause of action sought to be charged under § 7231 of Bal. Code (P. C. § 1799), but only the offense charged under § 7238 of such code (P. C. § 1790). The state has appealed.

Its brief is very meager. The respondent has filed no brief whatever herein, and made no appearance. As near as we can gather from the record, the lower court was of the opinion that respondent could not be convicted of this offense, but only of that provided against by *supra*, § 7238. We think the views by us expressed in *State v. Keith*, ante p. 77, 92 Pac. 893, are conclusive of the case at bar. Upon that authority, the judgment of the honorable superior court herein is reversed, and the cause remanded with instructions to overrule the demurrer and to proceed to trial with the cause.

<sup>1</sup>Reported in 92 Pac. 894.

[No. 6875. Decided December 20, 1907.]

THE STATE OF WASHINGTON, *Appellant*, v. F. VON SHULTZ,  
*Respondent*.<sup>1</sup>

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered May 4, 1907, upon sustaining a demurrer to the information. Affirmed.

*Virgil Peringer* and *George Livesey*, for appellant.

*Hardin & Hurlbut*, for respondent.

PER CURIAM.—This is an appeal by the state from a judgment of dismissal, after sustaining a demurrer to an information filed under Bal. Code, § 7226 (P. C. § 1794). The demurrer was properly sustained. Wharton, Criminal Law (10th ed.), 576; Bishop, Criminal Law, § 794; *Prindle v. State*, 31 Tex. Cr. 551, 21 S. W. 360, and authorities cited. *Honselman v. People*, 168 Ill. 172, 48 N. E. 304, and *Kelly v. People*, 192 Ill. 119, 61 N. E. 425, 85 Am. St. 323, cited by the appellant, arose under a different statute and are not in point. Had the defendant been convicted it might become our duty to further discuss the questions involved, but, inasmuch as the state alone is interested, we feel that its interests will be best subserved by silence.

The judgment is affirmed.

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[No. 6934. Decided January 6, 1908.]

CECIL NATSURHARA *et al.*, *Respondents*, v. GEORGE W. CLAPSADDLE  
*et al.*, *Appellants*, L. E. WITT *et al.*, *Interveners*.<sup>2</sup>

Appeal from a judgment of the superior court for King county, Albertson, J., entered January 29, 1907. Affirmed.

*Charles R. Crouch*, for appellants.

*James Hart* and *Jay C. Allen*, for respondents.

PER CURIAM.—The appeal in this case presents only a question of fact. We have examined the evidence and are satisfied with the findings of the trial court. The judgment must therefore be affirmed.

<sup>1</sup>Reported in 93 Pac. 1135.

<sup>2</sup>Reported in 93 Pac. 1134.

Mar. 1908]

Opinion Per Curiam.

[No. 6863. Decided January 8, 1908.]

NELLIE BLANGY, *Respondent*, v. CLARA E. SYLVESTER, *Appellant*,  
ROBERT J. MCCHESENEY, *Intervener*, and CHARLES E. MARVIN  
& SONS COMPANY, *Respondents*.<sup>1</sup>

Appeal from a judgment of the superior court for King county,  
Albertson, J., entered April 1, 1907. Appeal dismissed.

*George Marvin Savage* and *May Sylvester*, for appellant.

*Shepard & Flett*, for respondents Blangy and Marvin & Sons  
Company.

PER CURIAM.—The record in this case shows a settlement and complete satisfaction of the whole controversy. The appeal will therefore be dismissed.

[No. 6906. Decided January 9, 1908.]

*In the Matter of the Petition of* THE OREGON & WASHINGTON  
RAILROAD COMPANY.

OREGON & WASHINGTON RAILROAD COMPANY, *Appellant*, v. D. R.  
ABRAHAM *et al.*, *Respondents*.<sup>2</sup>

Appeal from a judgment of the superior court for King county,  
Morris, J., entered January 25, 1907. Appeal dismissed.

*W. W. Cotton*, *H. F. Conner*, and *John P. Hartman*, for appellant.

*Kenneth Mackintosh*, *E. B. Herald*, and *A. J. Tennant*, for respondents.

PER CURIAM.—The controversy forming the subject-matter of this appeal ceased to exist by the judgment of this court in the case of *State ex rel. Oregon & Washington R. Co. v. Abraham*, ante p. 215, 93 Pac. 325. The appeal will therefore be dismissed.

[No. 7119. Decided February 13, 1908.]

SPOKANE FALLS & NORTHERN RAILWAY COMPANY, *Respondent*, v.  
STEVENS COUNTY *et al.*, *Appellants*.<sup>3</sup>

Appeal from a judgment of the superior court for Stevens county,  
Sullivan, J., entered September 23, 1907. Affirmed.

*The Attorney General*, *J. A. Rochford*, and *John P. Judson*, for appellants.

*M. J. Gordon* and *A. J. Laughon*, for respondent.

<sup>1</sup>Reported in 93 Pac. 210.

<sup>2</sup>Reported in 93 Pac. 326.

<sup>3</sup>Reported in 93 Pac. 927.

PER CURIAM.—The complaint in this case is in all material respects similar to the complaint considered by this court in *Great Northern R. Co. v. Snohomish County*, ante p. 478, 93 Pac. 924. There the demurrer to the complaint was sustained, while in this case the demurrer was overruled. In that case the plaintiffs stood on their complaint, while in this case the defendants stood on their demurrer. For the reasons stated in the opinion just filed, the judgment of the court below is affirmed.

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[No. 6933. Decided March 4, 1908.]

THE CITY OF SEATTLE, *Appellant*, v. SEATTLE ELECTRIC COMPANY,  
*Respondent*.<sup>1</sup>

Appeal from a judgment of the superior court for King county, Morris, J., entered March 7, 1907. Affirmed.

*Scott Calhoun* and *Elmer E. Todd*, for appellant.

*James B. Howe* and *Hugh A. Tatt*, for respondent.

PER CURIAM.—This case presents the question discussed and decided in *Seattle v. Seattle Electric Co.*, ante p. 599, 94 Pac. 194. For the reasons therein stated it will stand affirmed.

<sup>1</sup>Reported in 94 Pac. 196.

# INDEX.

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## ABANDONMENT:

Of homestead, see HOMESTEAD, 2.

## ABATEMENT AND REVIVAL:

Injunction against abatement of nuisance on leased premises, see INJUNCTION, 1.

Judgment as bar in another action, see JUDGMENT, 4-6.

Of nuisance by termination of lease, see LANDLORD AND TENANT, 2.

## ACCEPTANCE:

Part payments, see ACCORD AND SATISFACTION.

## ACCESSORIES:

See CRIMINAL LAW, 1.

## ACCIDENT:

Injury to passenger on street car, see CARRIERS.

Injuries to servant, see MASTER AND SERVANT.

Personal injuries in general, see NEGLIGENCE.

## ACCORD AND SATISFACTION:

1. ACCORD AND SATISFACTION — PART PAYMENT — CONSIDERATION — ESTOPPEL. Where a mortgagee deemed himself insecure by reason of large accumulations of overdue interest, and agreed to remit a portion of the interest and reduce the rate thereafter in consideration of payment of a part of the interest then due, he cannot, after accepting the payment, and after the lapse of three years and the acceptance of interest at the reduced rate, assert the invalidity of the original agreement for want of consideration. *Hidden v. German Savings and Loan Society*..... 384

## ACCRUAL:

Of right of action, see LIMITATION OF ACTIONS.

## ACKNOWLEDGMENT:

Of deed, necessity, see DEEDS, 1.

## ACQUISITION:

Of homestead, see HOMESTEAD, 1.

**ACTION:**

- Enforcement of agricultural liens, see AGRICULTURE.
- Dissolution of attachment, see ATTACHMENT.
- Disbarment of attorney, see ATTORNEY AND CLIENT.
- Recovery of deposits in general, see BANKS AND BANKING, 1-5.
- On negotiable instruments, see BILLS AND NOTES.
- Cancellation of written instrument, see CANCELLATION OF INSTRUMENTS.
- Injuries to passengers, see CARRIERS, 2-5.
- Breach of contract, see CONTRACTS, 4.
- For dissolution of corporation, see CORPORATIONS, 9.
- Contract of subscription, see CORPORATIONS, 4-7.
- Against foreign corporations, see CORPORATIONS, 10.
- For establishment and determination of heirship, see DESCENT AND DISTRIBUTION.
- For divorce, see DIVORCE.
- Action for recovery of specific real property founded on right of possession and right to damages for deprivation thereof, see EJECTMENT.
- Taking of or injury to property in exercise of power of eminent domain, see EMINENT DOMAIN.
- Suits in equity, see EQUITY.
- Wrongful execution, see EXECUTION.
- For negligent setting of fire, see FIRES.
- Garnishment proceedings, see GARNISHMENT.
- To enjoin abatement of nuisance, see INJUNCTION, 1.
- On injunction bond, see INJUNCTION, 3-6.
- On insurance policy, see INSURANCE.
- Bar by former adjudication, see JUDGMENT, 4-6.
- Cancellation of judgment, see JUDGMENT, 2.
- Unlawful detainer of leased premises, see LANDLORD AND TENANT, 3, 4.
- For libel or slander, see LIBEL AND SLANDER.
- Limitation of statute, see LIMITATION OF ACTIONS.
- For conversion of logs, see LOGS AND LOGGING.
- By servant for personal injuries, see MASTER AND SERVANT.
- For wages, see MASTER AND SERVANT, 4.
- Wrongful discharge of employee, see MASTER AND SERVANT, 3.
- Foreclosure of mechanics' lien, see MECHANICS' LIENS.
- For injuries to person or property in general, see NEGLIGENCE.
- Joinder of legal and equitable causes, see QUIETING TITLE.
- Reformation of written instrument, see REFORMATION OF INSTRUMENTS.
- For price of goods sold, see SALES, 7-12.
- Rescission of sale of personal property, see SALES, 2, 4.
- By buyer, breach of contract, see SALES, 1.

**ACTION—CONTINUED.**

Against school districts, see **SCHOOLS AND SCHOOL DISTRICTS**.  
 For conversion of goods, see **TROVER AND CONVERSION**.  
 Determination of water rights, see **WATERS AND WATER COURSES**.

**ADEQUATE REMEDY AT LAW:**

Adequacy of remedy by appeal, see **CERTIORARI**, 1.

**ADMINISTRATION:**

Of estate of decedent, see **EXECUTORS AND ADMINISTRATORS**.

**ADULTERY:**

Condonation and revival of offense, see **DIVORCE**, 1.

1. **ADULTERY—ELEMENTS OF OFFENSE—PERSONS LIABLE.** Under Bal. Code, § 7230, defining adultery as the sexual intercourse between a married person and one who is not such married person's husband or wife, an unmarried man living in a state of adultery with a married woman is guilty of the offense, the statute applying to both parties. *State v. Keith*..... 77

**ADVANCES:**

Liens for money advanced in compromising foreclosure suit, see **MONEY PAID**.

**ADVERSE POSSESSION:**

1. **ADVERSE POSSESSION—ENTRY UNDER CLAIM OF RIGHT—HOSTILITY OF POSSESSION.** One who enters upon land in good faith, supposing it to be government land, with a view to acquiring title, may, upon discovering his mistake, proceed to hold openly and notoriously in hostility to the actual owner, so as to acquire title by adverse possession in ten years thereafter. *Johnson v. Conner*..... 431
2. **SAME—EVIDENCE—NONPAYMENT OF TAXES—EFFECT.** The nonpayment of taxes by one in adverse possession of land is insufficient in itself to disprove an adverse holding clearly shown by other evidence. *Johnson v. Conner* ..... 431
3. **SAME—EXTENT OF POSSESSION.** Adverse possession of an entire tract is not shown where the evidence of adverse holding was confined to a portion of the tract, and there was no such occupancy or use thereof as manifested an intention to claim the balance. *Johnson v. Conner* ..... 431
4. **ADVERSE POSSESSION—COLOR OF TITLE—DEED OUTSIDE OF CHAIN OF TITLE.** Adverse possession of shore land lots belonging to the state cannot be claimed to be under color of title by virtue of a deed thereof made by a third person who was never in possession and was not shown to have ever had any title thereto. *Bryant Lumber & Shingle Mill Co. v. Pacific Iron & Steel Works*..... 574

**ADVERSE POSSESSION—CONTINUED.**

5. **ADVERSE POSSESSION—AGAINST STATE—PAYMENT OF TAXES.** The payment of taxes for seven years upon shore land lots does not show title as against the state. *Bryant Lumber & Shingle Mill Co. v. Pacific Iron & Steel Works*..... 574
6. **ADVERSE POSSESSION—HOSTILE CHARACTER—TENANTS IN COMMON—DIVORCED HUSBAND AND WIFE—EVIDENCE—SUFFICIENCY.** There is no sufficient evidence of a holding of real estate by a husband adversely to his divorced wife, so as to make the same separate instead of community property, where it appears that in his action for a divorce no mention was made of the property, the wife having at that time on file her community property claim to the same, to the knowledge of the husband; since the decree of divorce left them tenants in common, and possession and receipt of rents and payment of taxes by him thereafter for ten years, without communication with his cotenant, will not constitute adverse possession. *Graves v. Graves* ..... 664
7. **ADVERSE POSSESSION—PAYMENT OF TAXES—CLAIM OF TITLE—EVIDENCE—SUFFICIENCY.** A plea of adverse possession of real property, by the payment of taxes for seven years under claim of title, is not sustained by evidence that a third party had paid taxes at defendant's request for quite a while, no year or series of years being specified, nor where evidence of his claim of title by purchase was contradictory and evasive. *McMillan v. Walker*..... 342

**AFFIDAVITS:**

As part of record on appeal, see **APPEAL AND ERROR**, 4, 14.

**AGREEMENT:**

See **CONTRACTS**.

**AGRICULTURE:**

1. **AGRICULTURE—LIENS—DEFENSES—PLEADING.** In an action to foreclose a lien for labor in clearing land, a counterclaim for damages by reason of failure to complete the work in time for the crop of 1906 is demurrable, when the contract did not require the work to be done within that time. *Owen v. Casey*..... 673
2. **AGRICULTURE—LIENS—LEASEHOLD INTEREST.** A lien for labor in clearing land attaches against a leasehold estate. *Owen v. Casey* 673

**ALIENATION:**

Of lands by Indians, see **INDIANS**, 1.

**ALIMONY:**

In action for divorce, see **DIVORCE**, 5, 6.

**ALLOTMENT:**

Of Indian lands, see **INDIANS**, 1.

**ALLOWANCE:**

To surviving wife, husband or children of decedent, see **EXECUTORS AND ADMINISTRATORS**, 2.

**AMENDMENT:**

Of pleadings on reversal of judgment, see **APPEAL AND ERROR**, 44.

Of notice of lien, see **MECHANICS' LIENS**, 3.

Of pleading, see **PLEADING**, 1.

**AMOUNT IN CONTROVERSY:**

Jurisdictional amount, see **APPEAL AND ERROR**, 1.

**ANCESTOR:**

See **DESCENT AND DISTRIBUTION**.

**ANSWER:**

Pleading immaterial issues in action on guarantee, see **BILLS AND NOTES**.

Of party on interrogatories or examination before trial, see **DISCOVERY**.

**APPEAL AND ERROR:**

Existence of remedy by appeal as bar to certiorari, see **CERTIORARI**, 1.

Review and reduction of excessive verdict, see **DAMAGES**, 1, 2.

Supersedeas on appeal from decree awarding alimony, see **DIVORCE**, 6.

From decree for alimony, see **DIVORCE**.

Condemnation proceedings, see **EMINENT DOMAIN**, 19, 20.

Right of administrator to appeal from order of final distribution, see **EXECUTORS AND ADMINISTRATORS**, 5, 6.

Finality of order setting aside homestead for use of widow and children, see **JUDGMENT**, 2.

Review of void proceedings granting franchise, see **MUNICIPAL CORPORATIONS**, 1.

Remedy by appeal or writ of error as barring prohibition, see **PROHIBITION**.

Prejudice at trial as constituting reversible error, see **TRIAL**, 3, 4, 7, 8.

Harmless error at trial, see **TRIAL**, 3.

Harmless error in instructions in action for conversion of logs, see **TROVER AND CONVERSION**, 3.

**III. DECISIONS REVIEWABLE.**

1. **APPEAL—DECISIONS REVIEWABLE—AMOUNT IN CONTROVERSY—EQUITABLE ACTIONS—INTERPLEADER.** An action of interpleader, under Bal. Code, § 4843, wherein the county auditor deposited a warrant in court and asked that the conflicting claims of the defendants thereto be determined, is of equitable cognizance, and appeal lies to the supreme court regardless of the amount in controversy. *Agnew v. Barto & Son's Bank*..... 66  
45—48 WASH.

## APPEAL AND ERROR—CONTINUED.

2. **APPEAL—DECISIONS REVIEWABLE.** An appeal from a portion of a decree is expressly authorized by Bal. Code, § 6503. *State ex rel. Holcomb v. Yakey*..... 419
3. **APPEAL—FINALITY OF JUDGMENT—REFUSAL TO DISMISS.** An order refusing a voluntary dismissal of an action is not appealable as a final order, but may be reviewed on appeal from the final judgment. *State ex rel. Korsstrom v. Superior Court*..... 671

## IV. RIGHT TO APPEAL.

4. **APPEAL—CESSATION OF CONTROVERSY—AFFIDAVITS — SUPPLEMENTAL RECORD.** A motion to dismiss an appeal because of the cessation of the controversy may be supported by affidavits containing copies of parts of the record below, which need not be brought up by supplemental record, where the affidavit is undenied. *Kelso v. American Investment & Improvement Co.*..... 5
5. **SAME—TEMPORARY RECEIVERSHIP.** An appeal from an order appointing a temporary receiver will be dismissed because of the cessation of the controversy, where it is shown that, pending the appeal, the case had been tried on its merits and the temporary receivership superseded by a permanent receivership. *Kelso v. American Investment & Improvement Co.*..... 5
6. **SAME—REVERSAL NOT BENEFICIAL—CESSATION OF CONTROVERSY.** In condemnation proceedings, the defendant cannot allege error in that he was not allowed to show that his saloon license was rendered valueless by the appropriation, where pending appeal the license expired and he had received the benefit of it; since the controversy as to that had ceased before the hearing. *Port Townsend Southern R. Co. v. Nolan*..... 382

## V. PRESERVATION OF GROUNDS.

7. **APPEAL—REVIEW—QUESTIONS NOT PRESENTED BELOW.** Unsuccessful plaintiffs in ejectment, entitled to a lien for taxes paid, cannot assert a claim therefor on appeal, when not presented in the court below. *Holly Street Land Co. v. Beyer*..... 422
8. **APPEAL—RESERVATION OF GROUNDS—OBJECTIONS TO EVIDENCE.** Error in the admission of evidence cannot be urged on appeal, where only one objection to that character of evidence was made and the objection was not ruled upon nor the question answered. *Bright v. Hanover Fire Insurance Co.*..... 60

## VI. PARTIES.

9. **APPEAL AND ERROR—PARTIES—GARNISHEES.** Garnishees, who filed answers, are not adversely affected by a judgment in the main case, in favor of the defendant, and are not necessary parties to an appeal therefrom. *Sudden & Christenson v. Morse*..... 101

## APPEAL AND ERROR—CONTINUED.

10. APPEAL—PARTIES—JOINDER—NOTICE—DISMISSAL. An appeal will be dismissed as to a coparty, where the record fails to show that he joined in the notice of appeal, or that he filed any appeal bond, and no brief was filed in his behalf. *Perkins v. Peirce*..... 380

## VII. REQUISITES FOR TRANSFER.

11. APPEAL—NOTICE—SUFFICIENCY. An oral notice of appeal, given in open court at the time of signing judgment of dismissal, is sufficient; and the claim of insufficiency on the ground that the adverse party was not present cannot be first made on appeal where the judgment was regular on its face. *Carlson v. Curren*..... 249

## IX. SUPERSEDEAS.

12. APPEAL—BONDS—SUPERSEDEAS — DESCRIPTION OF JUDGMENT — LIABILITY OF SURETY. An appeal by a lien claimant from a judgment declaring the priority of and foreclosing a mortgage, with an application for an order fixing the amount of the bond to supersede the judgment "and the whole thereof," wherein the bond given showed on its face that it was given for that purpose and in terms stayed the whole judgment, is an appeal from the whole judgment and not merely from that part declaring the priority of the liens; and upon affirmance, the surety is liable for the full amount of the judgment. *Rogers v. Minneapolis Threshing Machine Co.*..... 19
13. APPEAL—SUPERSEDEAS BY SUPREME COURT—COURTS—JURISDICTION—INJUNCTION—SUSPENSION. After an appeal has been perfected from a prohibitory injunction, the supreme court has jurisdiction to issue an order of supersedeas, where the appeal is being prosecuted in good faith and the suspension of the judgment can be granted without depriving respondents of ultimate relief; and an injunction against the operation of a railroad by a common carrier in a street abutting on respondent's lots will be suspended upon the filing of a suitable bond conditioned upon the payment of any damages sustained by reason of the suspension. *Lund v. Idaho and Washington Northern Railroad*..... 453

## X. RECORD.

14. APPEAL—RECORD—BILL OF EXCEPTIONS—AFFIDAVIT. An order denying a continuance cannot be reviewed on appeal where the affidavit on which it was based was not brought up by a bill of exceptions or statement of facts. *Gray v. Granger*..... 442
15. APPEAL—RECORD—STATEMENT OF FACTS—COSTS—REVIEW OF EXCEPTIONS. Exceptions to a cost bill cannot be reviewed where the evidence on the hearing was not brought up by a bill of exceptions or statement of facts, and counsel do not agree as to what matters were considered by the court. *Ames v. Farmers and Mechanics' Bank* ..... 328

## APPEAL AND ERROR—CONTINUED.

16. APPEAL—RECORD—TRANSCRIPT. An instruction requested in writing and filed with the clerk is properly made part of the record on appeal without being included in the bill of exceptions or statement of facts. *Tergeson v. Robinson Manufacturing Co.*..... 294
17. APPEAL—RECORD—BILL OF EXCEPTIONS—AFFIDAVITS. Affidavits used upon a hearing to quash a service of summons must be brought up on appeal by bill of exceptions or statement of facts, or appeal from the order will be dismissed. *McCart v. Racine Woolen Mills, Blake & Co.*..... 314
18. APPEAL—RECORD—ADMISSION OF EVIDENCE. Prejudicial error cannot be claimed in admitting in evidence a letter, where the same is not made part of the record on appeal. *Cozard v. Cozard*..... 124
19. APPEAL—RECORD—BILL OF EXCEPTIONS—TIME FOR SERVICE. A bill of exceptions not served within 90 days from the date of rendition of judgment will be struck out where no extension of time was given, and the judgment affirmed when no questions are presented except such as are embodied in the bill. *Brown v. Kinney*..... 448
20. APPEAL—RECORD—STATEMENT OF FACTS—TIME FOR FILING. A statement of facts, not filed within the ninety days prescribed by Bal. Code, § 5062, will be struck out, as the time cannot be extended beyond that period. *Owen v. Casey*..... 673

## XIII. DISMISSAL.

21. APPEAL—DISMISSAL—MOTION—STATEMENT IN BRIEFS. Where a motion to dismiss an appeal was filed before briefs were served, calling attention thereto in the briefs, in a conspicuous place, is sufficient notice that the motion will be urged at the hearing, without setting the same out in the brief. *Kelso v. American Investment & Improvement Co.*..... 5
22. APPEAL—DISMISSAL—QUESTIONS REVIEWED. An appeal from a judgment dismissing an action for failure to file a bill of particulars will not be dismissed for the reason that no abuse of discretion appears; since that is a question to be determined on the merits of the appeal and not on motion to dismiss. *Moore v. Scharnikow*. 564

## XVI. REVIEW.

23. APPEAL—REVIEW—PRESENTATION OF QUESTIONS. The sufficiency of the complaint cannot be first raised on appeal where, supplemented by evidence admitted, a cause of action is disclosed. *Budlong v. Budlong* ..... 645
24. APPEAL—REVIEW—DISCRETION—NEW TRIAL. The refusal to grant an extension of time for filing a new trial will not be reviewed except for abuse of discretion. *Nelson v. Carlson*..... 651

APPEAL AND ERROR—CONTINUED.

25. APPEAL—HARMLESS ERROR—TRIAL—INSTRUCTIONS. An instruction, erroneous as an abstract proposition of law, is not ground for reversal, where taken with all the other instructions, it was not erroneous under the facts and not capable of prejudicing the appellant. *Hoff v. Japanese-American Fertilizer & Fisheries Co.*..... 581
26. APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS—BILLS AND NOTES—ENDORSEMENT. In an action upon promissory notes endorsed by defendant's decedent, in which the question of liability as endorser was not involved, an ambiguous instruction, to the effect that endorsement and delivery were necessary to transfer complete title to the note, is not prejudicial error, in the absence of a request for more specific instructions as to the necessity and purpose of an endorsement. *O'Connor v. Slatter*..... 493
27. APPEAL—REVIEW—HARMLESS ERROR—RULINGS ON PLEADING. Error, if any, in striking affirmative matter in a reply on the ground that it should have been set out in the complaint, is immaterial where the plaintiff was allowed to prove the facts alleged in the reply. *Waight v. Lake Washington Mill Co.*..... 402
28. APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE. It is not prejudicial error to refuse to allow an owner of a town lot to testify to its market value, where the testimony as to his knowledge and qualifications was extremely contradictory, and seven or eight other witnesses better qualified testified in his behalf. *Port Townsend Southern R. Co. v. Nolan*..... 382
29. APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE. Errors on rulings on admitting evidence are immaterial where the verdict was entered by direction of the court. *Gault v. Bradshaw*.. 364
30. APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE. Error in permitting a witness to answer a question as to whether he had made a contract for certain specified reasons, which reasons were sought to be shown, is without prejudice when the witness answered that he had made no such contract. *Collins v. Huffman* 184
31. APPEAL—REVIEW—HARMLESS ERROR. Error in overruling an objection to a question is without prejudice when the witness stated that he could not answer the question. *Collins v. Huffman*..... 184
32. APPEAL—REVIEW—VERDICT. The probative force of evidence is for the jury. *Sudden & Christenson v. Morse*..... 101
33. APPEAL—REVIEW—VERDICT. A general verdict for a defendant, in an action on a contract, will not be set aside upon appeal where there was a direct conflict of evidence upon an affirmative defense as to a mutual rescission of the contract. *Larson v. Lorer*.... 551
34. APPEAL—REVIEW—VERDICT—SUFFICIENCY OF EVIDENCE. A verdict for \$477.50, the exact amount claimed on a first cause of action, will not be set aside on appeal as contrary to the evidence from the

## APPEAL AND ERROR—CONTINUED.

- fact that the plaintiff's proof showed no such sum due on such cause of action, where the amount admitted to be due on the first cause of action, added to the amount claimed by the plaintiff upon a second cause of action, supported by his evidence, came to \$477.40; since the verdict might have been arrived at by such computation, and ten cents is too small a discrepancy to be noticed by the courts. *Bogard v. Bartruff*..... 15
35. APPEAL—REVIEW—VERDICT. A verdict approved by the trial judge will not be disturbed on appeal because against the testimony of a witness not directly contradicted; since his credibility was for the jury. *Johnson v. Great Northern R. Co.*..... 325
36. APPEAL—REVIEW—FINDINGS—QUESTIONS OF FACT. Whether the act of a partner is within the scope of his employment is a question of fact, and a finding thereon will not be disturbed if the evidence is sufficient to sustain it. *Merrill v. O'Bryan*..... 415
37. APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence where the trial judge saw and heard the witnesses, will not be disturbed on appeal, unless clearly unsupported by the weight of competent evidence. *Duteau v. Barto*..... 207
38. APPEAL—REVIEW—FINDINGS. A finding of a trial court upon conflicting evidence, after seeing and hearing the witnesses, while not binding, will not be disturbed unless the supreme court is well satisfied of error. *Ulrich v. Stephens*..... 199
39. APPEAL—REVIEW—EFFECT OF STIPULATION—DISCRETION—MECHANICS' LIENS—ATTORNEYS FEES. Where the parties stipulated that the court should fix the amount of attorney's fees on the foreclosure of a mechanics' lien, without the introduction of any evidence, the action of the court cannot be reviewed on appeal except for abuse of powers; and no such abuse appears from the allowance of \$150 in a sharply contested action involving \$340. *Housekeeper v. Livingstone* ..... 209
40. APPEAL—REVIEW—ORDER DISSOLVING ATTACHMENT. An order dissolving an attachment issued on the ground of a conveyance of property with intent to defraud creditors, heard upon affidavits filed by each party, will not be disturbed on appeal unless clearly erroneous. *Hendelman v. Kahan*..... 549
41. SAME—PREJUDICE. The burden is upon appellants to show that errors alleged operated to their prejudice. *Collins v. Huffman*.. 184
42. APPEAL—REVIEW—CORRECTION OF ERROR BY ADMISSION OF OTHER EVIDENCE. Error in excluding evidence of a witness to contradict evidence of the adverse party that she was present at a certain transaction, is not cured by testimony of the witness theretofore admitted enumerating the persons who were present without any mention of the party claimed to be present. *O'Connor v. Slatter*... 493

**APPEAL AND ERROR—CONTINUED.**

**XVII. DETERMINATION AND DISPOSITION OF CAUSE.**

43. **APPEAL—DECISION—LAW OF CASE.** A decision of the supreme court on a former appeal that the sum of \$2,000, stipulated to be paid on the violation of a contract not to enter into the butchering business, was stipulated damages and not a penalty, becomes the law of the case on a retrial, and fixes the damages upon a breach of the contract being shown. *Canady v. Knox*..... 685
44. **APPEAL—DECISION—PLEADINGS—AMENDMENT ON REVERSAL.** In an action on an insurance policy, where it appeared that the proofs of loss were not furnished in time and that defendant relied upon such fact for a defense, and no evidence of any waiver was offered, an application by plaintiffs to amend their complaint to show a waiver, made upon reversal of a judgment in their favor, comes too late. *Davis v. Northwestern Mutual Fire Association*..... 50

**APPEARANCE:**

Of nonresident as condition precedent to motion for dissolution of attachment, see **ATTACHMENT**, 3.

**APPLIANCES:**

Liability of employer for defects, see **MASTER AND SERVANT**, 5-7, 9, 14.

**APPLICATION:**

Of proceeds of mortgaged property, see **CHATTEL MORTGAGES**, 1, 2.

**APPOINTMENT:**

Oral appointment of broker as agent to sell land, see **BROKERS**, 1, 2.  
Of guardian for insane, see **INSANE PERSONS**.

**APPROPRIATION:**

Of water rights in public lands, see **WATER AND WATER COURSES**, 1-6.

**ARBITRATION AND AWARD:**

1. **ARBITRATION AND AWARD—PLEADING—SUFFICIENCY.** An affirmative defense of settlement by arbitration is demurrable where it fails to allege any written agreement for arbitration, the filing of any award, or any approval of the same by the court. *Owen v. Casey*..... 673

**ARGUMENT OF COUNSEL:**

In civil actions, see **TRIAL**, 3.

**ARTICLES:**

Construction of, right of foreign corporation to do trust business, see **CORPORATIONS**, 11.

**ASSESSMENT:**

- On unpaid subscriptions, see CORPORATIONS, 5.
- Of expenses of public improvements, see DRAINS.
- For public improvements, see MUNICIPAL CORPORATIONS, 2-6.
- Of tax, see TAXATION, 1, 2.

**ASSIGNMENT:**

- Of Indian allotment, presumption, see INDIANS, 1.

**ASSUMPTION:**

- Of risk by employee, see MASTER AND SERVANT, 19, 24-26.
- Injury from dangerous premises, see NEGLIGENCE, 6.

**ATTACHMENT:**

- See GARNISHMENT.
- Scope of review on appeal from order of dissolution, see APPEAL AND ERROR, 40.
- Exemption from attachment of real property as homestead, see HOMESTEAD, 2.
- 1. ATTACHMENT—LIEN. The lien of an attachment of real estate is merged in that of the judgment when the latter is entered. *Gullickson v. Fenlon*..... 503
- 2. ATTACHMENT—DISSOLUTION—GROUNDS. A motion to dissolve an attachment upon the ground that the property attached was exempt is not warranted by Bal. Code, § 5376, authorizing a dissolution of an attachment that has been improperly or irregularly issued. *Holman v. Cooper*..... 24
- 3. SAME—APPEARANCE OF DEFENDANT. Nonresident defendants, whose real estate has been attached, cannot, under Bal. Code, § 5376, move to dissolve the attachment until after a general appearance is made submitting themselves to the jurisdiction of the court. *Holman v. Cooper* ..... 24
- 4. ATTACHMENT—DISSOLUTION—REASONABLE CAUSE. Upon dissolution of an attachment, the court need not enter a finding that there was reasonable ground for the attachment, the same being immaterial in such action. *Hendelman v. Kahan*..... 549

**ATTORNEY AND CLIENT:**

- Review of discretionary action in allowing attorneys' fees on stipulation of parties, see APPEAL AND ERROR, 39.
- Attorney's fees as damages in action on injunction bond, see INJUNCTION, 4.
- Bill of particulars in action for services, see PLEADING, 2.
- Argument or conduct of counsel at trial in civil actions, see TRIAL, 3.
- Improper conduct in examination of witness, see WITNESSES, 7.

## ATTORNEY AND CLIENT—CONTINUED.

1. **ATTORNEY AND CLIENT—DISBARMENT—JURISDICTION.** The supreme court has inherent original jurisdiction, irrespective of statutes, to suspend or disbar an attorney for contemptuous conduct. *In re Robinson* ..... 153
2. **SAME—GROUNDS—CONTEMPTUOUS CONDUCT.** An attorney is guilty of contemptuous conduct warranting his suspension from practice, under Bal. Code, § 4765, requiring an attorney to maintain due respect for the court and to refrain from any artifice or false statement and all offensive personality, where his petition for a rehearing attempts to intimidate the court into rendering a favorable decision by setting forth that scandalous and offensive rumors are current to the effect that a majority of the court had prejudged the case and agreed to dismiss the appeal in return for political favors received, and that the only way to refute such scandals and uphold the dignity of the court would be to deny the motion to dismiss and hear the case on its merits. *In re Robinson*..... 153
3. **SAME—DEFENSES—DISAVOWAL—SENTENCE.** A disavowal of improper motive in the employment of scandalous and contemptuous language in a petition for a rehearing, with an apology, will not be considered a complete defense to disbarment proceedings, where the attorney had long experience at the bar; and the offense being flagrant, mere reprimand is insufficient, and the attorney will be suspended for six months, and costs of briefs taxed against him. *In re Robinson*..... 153

## AUTHORITY:

- Of bank to operate branch bank, admissibility of evidence, see **BANKS AND BANKING**, 1-3.
- Of broker, see **BROKERS**, 1, 2.
- Of partner, declarations as evidence, see **EVIDENCE**, 2.
- Proof of oral authority to broker to make contract of sale, see **FRAUDS, STATUTE OF**, 1.
- Of partner, scope of business, see **PARTNERSHIP**, 2.
- Of county commissioners to vacate plats of tide lands, see **PUBLIC LANDS**, 3.

## AWARD:

- See **ARBITRATION AND AWARD**.

## BAILMENT:

- Carriage of goods, see **CARRIERS**, 1.

## BANKRUPTCY:

- Conclusiveness of judgment in bankruptcy proceedings, see **JUDGMENT**, 5.

## BANKRUPTCY—CONTINUED.

1. **BANKRUPTCY—DECREE—FORM—ALTERNATIVE PROVISIONS—COLLATERAL ATTACK—PRESUMPTIONS.** Upon a collateral attack of judgments against a bankrupt, reciting that recovery was had against him because of his fraud in obtaining property, and which ordered recovery of specified amounts for damages on account of the fraud, it will be presumed that the court found that return of the property could not be had, and the judgments are not defective in form because not in the alternative. *Nichols v. Doak*..... 457
2. **SAME—DISCHARGE—EFFECT OF FRAUD IN OBTAINING PROPERTY—LIEN OF JUDGMENT.** Under § 17 of the Bankruptcy Act, judgments obtained in bankruptcy proceedings because of fraud of the bankrupt in obtaining property are not affected by his discharge in bankruptcy, and become liens on property thereafter acquired by the bankrupt while the judgments are in force. *Nichols v. Doak*... 457

## BANKS AND BANKING:

Application by bank as first mortgagee of proceeds from mortgaged property, see **CHattel MORTGAGES**, 1, 2.

1. **BANKS AND BANKING—DEPOSITS—RELATIONS WITH DEPOSITORS—AUTHORITY TO OPERATE BRANCH BANK—EVIDENCE—ADMISSIBILITY.** Upon an issue as to whether a defendant bank authorized the establishment of a branch in a nearby town, it is competent to show that an advertisement was published in a newspaper making such representation, and that the same was mailed directly to the defendant, and also of a similar circular received by the defendant at its office; it being for the jury to say whether the defendant bank had knowledge of the contents of the paper and circulars. *Ames v. Farmers and Mechanics Bank* ..... 328
2. **SAME.** Upon such an issue, an application and a surety bond containing recitals that the branch bank was controlled by the defendant bank, signed by the executive officers of both banks, are admissible in evidence, where the course of dealing was such that the directors by ordinary diligence could have known the facts. *Ames v. Farmers and Mechanics Bank*..... 328
3. **SAME.** For the same reason, letterheads of letters sent to the defendant bank containing the statement that it was branch of the defendant, are admissible in evidence. *Ames v. Farmers and Mechanics Bank* ..... 328
4. **BANKS AND BANKING—DEPOSITS—ACTIONS TO RECOVER—PLEADING—ISSUES—INSTRUCTIONS.** In an action to recover bank deposits in an alleged branch of the defendant bank, where the whole controversy was as to whether defendant had at all times been in possession of the branch bank, an affirmative defense that the plaintiffs were in possession of the assets raises no new issue, and instructions thereon are properly refused. *Ames v. Farmers and Mechanics Bank* ..... 328

**BANKS AND BANKING—CONTINUED.**

5. **BANKS AND BANKING—AUTHORITY TO OPERATE BRANCH—RATIFICATION—ACTIONS TO RECOVER DEPOSITS—INSTRUCTIONS.** In an action to recover bank deposits in an alleged branch of the defendant bank, where the issue was as to the knowledge of the defendant, it is proper to instruct that the defendant would be liable if it failed to repudiate the operation of the branch bank within a reasonable time after having knowledge that it was being conducted by its officers as a branch, to the same extent as if its officers were given precedent authority; and the same is not open to the objection that it authorizes ratification upon mere constructive knowledge. *Ames v. Farmers and Mechanics Bank*..... 328
6. **BANKS AND BANKING—DRAFTS—LIABILITY OF CUSTOMER TO BANK.** Where defendants, who were customers of plaintiffs' bank, purchased a New York draft that had been issued to J. C., but which had come into the possession of another person of the same name who claimed to be the payee and forged the payee's endorsement, and after warning as to their liability, endorsed the draft and advanced part of the sum to the forger, and left the draft for collection, and upon notice from New York that it had been paid, purchased another draft of the plaintiffs for the balance and sent it to the forger, and the latter draft came into the hands of an innocent purchaser for value, who recovered judgment thereon against the plaintiffs, who had stopped payment and defended at defendant's request, the equities of the case make the defendants liable over to the plaintiffs for the amount of the draft, the plaintiffs having given defendants prompt notice of the forgery of the first draft as soon as it was discovered; since there was no negligence or improper banking making plaintiffs' bank responsible to defendants for the amount of the draft. *Heim v. Neubert*..... 587

**BAR:**

Of action by former adjudication, see JUDGMENT, 4-6.

**BARBERS:**

Regulation of, as within police power, see CONSTITUTIONAL LAW, 1, 2.

**BENEFITS:**

Assessment for benefits from construction of drainage district, see DRAINS.

**BIAS:**

Of juror, see JURY.

**BILL OF PARTICULARS:**

In pleading in civil action, see PLEADING, 2.

**BILL OF SALE:**

Necessity of recording, see FRAUDULENT CONVEYANCES.

**BILLS AND NOTES:**

Harmless error in instructions, see **APPEAL AND ERROR**, 26.

Estoppel to object to mode of paying note, see **TENDER**, 1.

1. **BILLS AND NOTES—GUARANTEE—PLEADING—ANSWER—FRAUD—IM-MATERIAL ISSUES.** In an action upon a written guarantee of a note, which was denied by the answer, an affirmative answer admitting an endorsement in blank and alleging that the written guarantee was thereafter fraudulently stamped on the note and setting forth the fraudulent means whereby the endorsement in blank was secured and the previous fraud perpetrated on the defendant, adds nothing to the denials of the answer, and it is error to submit the affirmative defense to the jury, no affirmative relief having been asked. *O'Connor v. Slatter*..... 493

**BONA FIDE PURCHASER:**

At executor's sale, see **EXECUTORS AND ADMINISTRATORS**, 7.

Of lands, see **VENDOR AND PURCHASER**, 5.

**BONDS:**

On appeal, see **APPEAL AND ERROR**, 12, 13.

Cost bonds, see **COSTS**.

Injunction bonds, see **INJUNCTION**, 3, 4.

Municipal bonds, see **MUNICIPAL CORPORATIONS**, 7-12.

Instructions in action on injunction bond, see **TRIAL**, 8.

**BOOMS:**

Obstruction of stream by boom, see **LOGS AND LOGGING**.

**BREACH:**

Of contract, see **CONTRACTS**, 4.

Of contract of sale, see **SALES**, 5, 9, 11, 12.

**BRIEFS:**

Assignment of errors in, see **APPEAL AND ERROR**, 21.

**BROKERS:**

Laws requiring written contract as class legislation, see **CONSTITUTIONAL LAW**, 3.

Brokerage business by foreign corporation, filing articles, see **CORPORATIONS**, 12.

Sufficiency of contract of employment, see **FRAUDS, STATUTE OF**.

1. **BROKERS—SALE OF LANDS—AUTHORITY—FRAUDS, STATUTE OF.** Where the owners listed certain real estate with brokers, giving them the exclusive handling of the property for thirty days by a memorandum and conversation specifying the conditions on which they might sell the property or find a purchaser, whereby the owner agreed to notify the brokers at once in writing if the property was withdrawn from the market or sold, evidence is not admissible to

**BROKERS—CONTINUED.**

show a usage and custom among brokers whereby the transaction was treated as authority to make a binding contract of sale, or to show that the owner had stated to a third person that the brokers had exclusive authority to sell for thirty days; since the memorandum did not purport to be a contract, nor give the brokers any right to enter into a contract of sale, and there was no clear and convincing proof of oral authority to make such a contract. *Sylviaasen v. Hanson*..... 608

2. **BROKERS—LIABILITY TO PRINCIPAL—ORAL APPOINTMENT—SALE BY AGENT—EVIDENCE—SUFFICIENCY.** The evidence is sufficient to show that real estate brokers acted as agents for the owners in selling land for \$2,500, and representing to the owners that they received only 2,000, and the brokers are therefore liable to the owners for the balance retained by them, where it appears that the brokers had written authority to sell for the owners for a limited time, that after expiration of such time, they were given oral authority to sell for \$2,500, with five per cent commissions, and after negotiating a sale for said amount, wired an offer of \$1,900 and represented that \$2,000 was the best offer they could obtain, deed being made reciting such sum as consideration in reliance on the representations; and it is immaterial on the question of agency that the brokers had no written authority as required by statute to enable them to claim commissions. *Merriman v. Thompson*..... 500
3. **BROKERS—CONTRACT FOR COMMISSION—ASSENT.** Where an owner listed his property with a broker and the broker stated that he would charge a commission of five per cent for effecting a sale, the owner cannot, after concluding a sale made by the agent, claim that he did not agree to the payment of the commission from the fact that he remained silent upon being told that such charge would be made. *Gault v. Bradshaw*..... 364

**BURDEN OF PROOF:**

To show prejudice from errors alleged, see **APPEAL AND ERROR**, 41.

**CANCELLATION OF INSTRUMENTS:**

See **REFORMATION OF INSTRUMENTS**.

Rescission of contracts, see **SALES**.

Rescission of contract of sale of land, see **VENDOR AND PURCHASER**, 1, 6.

1. **CANCELLATION OF INSTRUMENTS—FRAUD OR MISTAKE—EVIDENCE.** A deed and lease will not be set aside for fraud or mistake unless the evidence is clear and convincing. *Johnson v. Conner*..... 431

**CARRIERS:**

Presumption of negligence from collision, pleading and proof, see **PLEADING**, 5.

## CARRIERS—CONTINUED.

1. CARRIERS—OF GOODS — FREIGHT RATES — LIMITATIONS — LIABILITY FOR LOSS. A schedule of published freight rates for household goods, specifying "carrier's liability limited to \$5 per hundred pounds in case of loss, so receipted for," contemplates a limitation of liability only when receipt is actually issued; and where another rate was also specified, and nothing was said by the shipper on delivering the goods and no agreement made as to the rate or limitation, and no receipt issued, the carrier's liability on loss of the goods is not limited. *Harris v. Great Northern R. Co.*..... 437
2. CARRIERS—INJURY TO PASSENGERS—OBSTRUCTION ON TRACK — DEGREE OF CARE—INSTRUCTIONS. In an action for personal injuries sustained in a street car collision, it is proper to refuse an instruction exonerating the defendant from liability in case the motorman's failure to avoid the collision, with the exercise of the highest degree of care, was due to some clay deposited on the track by "some agency not under the control of the defendant," where the instruction omitted the qualification that the defendant must have exercised the highest degree of skill and care to have discovered and removed the obstruction. *Walters v. Seattle, Renton & Southern R. Co.*..... 233
3. SAME—COLLISION OF STREET CARS—PRESUMPTIONS—PLEADING AND PROOF—SPECIFIC ALLEGATIONS. The fact that the plaintiff was unable to prove the particular cause of a collision of street cars, as set forth in her complaint, does not deprive her of the benefit of the presumption that negligence is presumed from the happening of a collision, since that was alone the substance of the issue, and the particular cause alleged need not be proved. *Walters v. Seattle, Renton & Southern R. Co.*..... 233
4. CARRIERS—INJURIES TO PASSENGERS—COLLISION WITH VEHICLE—CONTRIBUTORY NEGLIGENCE IN ALIGHTING—EVIDENCE—SUFFICIENCY. In an action by a passenger against a street car company for damages sustained by reason of a collision with a wagon, the plaintiff was guilty of contributory negligence, and there was no sufficient evidence of negligence on the part of the company, and a nonsuit is proper, where it appears that plaintiff was standing on the open deck of the car preparing to alight by stepping down to the running board, that he saw a wagon ahead at the crossing traveling parallel with and near to the side of the track where regading of the street was going on, but stepped down onto the running board attempting to get off in close proximity to the wagon, the wheels of which slipped or lurched toward the track, and collided with the running board, causing the injury. *Hyde v. Seattle Electric Co.*..... 393
5. SAME—NEGLIGENCE OF CARRIER—WATCHMAN AT CROSSING. In such a case it is not negligence upon the part of the company to fail to keep a watchman at the place who should have prevented the wagon from traveling so close to the track, as regards passengers alighting. *Hyde v. Seattle Electric Co.*..... 393

**CAVEAT EMPTOR:**

Purchasers at administrator's sale, see **EXECUTORS AND ADMINISTRATORS**, 7.

**CERTIFICATE:**

Certified copies, see **EVIDENCE**, 3.

Teacher's certificates, see **SCHOOLS AND SCHOOL DISTRICTS**, 2.

**CERTIORARI:**

Review of condemnation proceedings, see **EMINENT DOMAIN**, 4, 7, 8, 20.

1. **CERTIORARI—ADEQUACY OF REMEDY BY APPEAL.** There is no adequate remedy by appeal, and certiorari lies, where an administrator with the will annexed has been authorized to pay out \$500 per month to the widow of the deceased, and during six months has paid out over \$3,500 in costs of administration and other larger sums for other purposes. *State ex rel. Speckart v. Superior Court*..... 141
2. **CERTIORARI—TO CITY COUNCIL—MUNICIPAL CORPORATIONS—GRANT OF FRANCHISE—REVIEW.** An ordinance of a city council granting a franchise for the use of a street is a legislative act, and is not subject to review by writ of certiorari. *Tenny v. Seattle Electric Co.* ..... 150

**CESSATION OF CONTROVERSY:**

On appeal, see **APPEAL AND ERROR**, 4-6.

**CHARACTER:**

Of accused as evidence, see **CRIMINAL LAW**, 2.

**CHARGE:**

To jury in civil actions, see **TRIAL**, 4, 5, 7, 8.

**CHARTER:**

Of municipal corporations, see **MUNICIPAL CORPORATIONS**, 6.

**CHATTEL MORTGAGES:**

1. **CHATTEL MORTGAGES — PRIORITIES — APPLICATION OF PROCEEDS — BANKS AND BANKING—EVIDENCE—ADMISSIBILITY.** In an action by a second mortgagee of chattels to charge the first mortgagee, a banker, with sums received from the mortgagor which should have been applied to discharge the first mortgage, because (as alleged) proceeds of the mortgaged property, evidence on the part of the defendant is admissible to show that the sums received from the mortgagor were deposits derived in part from other sources than the mortgaged property, all made in one account, against which the mortgagor checked as a depositor. *Presby v. Melgard*..... 689

## CHATTEL MORTGAGES—CONTINUED.

2. SAME—FAILURE OF SECOND MORTGAGEE TO OBJECT TO APPLICATION. A banker, holding a first mortgage on a flock of sheep, their increase, and the clip of wool, upon which there is a second mortgage upon the sheep only, is not required to see that the proceeds of the wool, deposited in the bank by the mortgagor, is applied to discharge the first mortgage, where the mortgagor and second mortgagee had been partners, were both present when the mortgagor made the deposit and checked against the same, paying part of the proceeds to each mortgagee and part to a third person, the second mortgagee making no objection at the time, and where at the time of the deposit, the first mortgagee had sold an interest in, and was only part owner of, the bank. *Presby v. Melgard*..... 689
3. CHATTEL MORTGAGES—NATURE—TITLE—POSSESSION. Possession by the mortgagee of chattels, under a stipulation therefor in the mortgage, does not change the rule in this state that the legal title remains in the mortgagor. *Richter v. Buchanan*..... 32
4. SAME—POWER OF SALE—CONSTRUCTION. A power of sale in a chattel mortgage, authorizing the mortgagee to sell at retail, does not authorize a sale in bulk of stock remaining after a partial sale at retail. *Richter v. Buchanan*..... 32
5. SAME—UNAUTHORIZED SALE—CONVERSION—DAMAGES. A mortgagee in possession of chattels, who was empowered by the mortgage to sell the goods at retail, is guilty of a conversion in selling in bulk; and is liable in damages to the mortgagor for the value of the property over and above the mortgage debt. *Richter v. Buchanan*... 32
6. CHATTEL MORTGAGES—EXPENSE OF INSURANCE—TENDER. Where a chattel mortgage contained no provision requiring the mortgagors to keep the property insured, and there was no collateral agreement to that effect, a tender of the amount due the mortgagee need not include the expense of insurance procured by him. *Hidden v. German Savings' and Loan Society*..... 384
7. CHATTEL MORTGAGES—PAYMENT—TENDER AFTER DEFAULT. A tender of the amount due on a chattel mortgage, with costs, made before sale, discharges the lien of the mortgage, pending foreclosure, rendering a sale thereunder void. *Thomas v. Seattle Brewing & Malting Co.*..... 560
8. CHATTEL MORTGAGES—TENDER—SUFFICIENCY. A tender of the amount due on a chattel mortgage before sale, made by one to whom the mortgagor had sold the property, will be held sufficient where the amount was concededly correct and the jury found upon proper instructions that the rights of the party making the tender were disclosed to the officer or mortgagee. *Thomas v. Seattle Brewing & Malting Co.*..... 560

**CLAIMS:**

- Against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 3, 4.
- For damages, delay in making, see SALES, 12.
- Proof of claims by creditors, see WILLS.

**CLASS LEGISLATION:**

- See CONSTITUTIONAL LAW.

**COLLATERAL ATTACK:**

- On judgment, see JUDGMENT, 3.
- On assessment for public improvements, see MUNICIPAL CORPORATIONS, 5.

**COLLISION:**

- Between street cars, injury to passengers, see CARRIERS, 2, 3.

**COLOR OF TITLE:**

- Necessity to sustain adverse possession, see ADVERSE POSSESSION, 4.

**COMMISSIONS:**

- Of broker, see BROKERS, 2, 3.

**COMMON CARRIERS:**

- See CARRIERS.

**COMMON LAW:**

- Offenses not indicatable at common law, see EXTORTION.

**COMMUNITY PROPERTY:**

- Disposition on divorce, see DIVORCE, 3, 4.
- Delay of wife as bar to action for partition, see EQUITY.
- In general, see HUSBAND AND WIFE.

**COMPENSATION:**

- Of broker, see BROKERS.
- Pecuniary compensation for injuries caused by unlawful acts of another, see DAMAGES.
- For property taken for public use, see EMINENT DOMAIN, 3, 4, 19, 23, 24.
- For services, see MASTER AND SERVANT, 4.
- Of officers in general, see OFFICERS.
- Action by teacher to recover wages, see SCHOOLS AND SCHOOL DISTRICTS, 2.
- Of county engineer, scope of act, see STATUTES, 4.

**COMPETENCY:**

- Of witnesses in general, see WITNESSES, 1-4.

**COMPROMISE AND SETTLEMENT:**

- See ACCORD AND SATISFACTION.
- 46—48 WASH.

**COMPUTATION:**

Of limit of indebtedness, see MUNICIPAL CORPORATIONS, 12.

**CONDEMNATION:**

Taking property for public use, see EMINENT DOMAIN.

**CONDITIONAL SALES:**

See SALES, 4.

**CONDITIONS:**

Of contract, see CONTRACTS.

Precedent to condemnation proceedings, see EMINENT DOMAIN, 13.

Precedent to action for libel, see LIBEL AND SLANDER, 2.

Precedent to jurisdiction to sell real estate of insane person, see  
INSANE PERSONS.

Precedent to action on insurance policy, see INSURANCE, 3.

Precedent to action by teacher for wages, see SCHOOLS AND SCHOOL  
DISTRICTS, 2.

Precedent to action for specific performance, see SPECIFIC PERFORM-  
ANCE.

**CONDONATION:**

See DIVORCE, 1.

**CONFIDENTIAL RELATIONS:**

Disclosure of communications, see WITNESSES, 5.

**CONFIRMATION:**

Of sale of decedent's land, see EXECUTORS AND ADMINISTRATORS, 8.

**CONSTITUTIONAL LAW:**

Increase in compensation of officers during term of office, see Of-  
FICERS.

Regulation of practice of dentistry, see PHYSICIANS AND SURGEONS.

1. CONSTITUTIONAL LAW—CLASS LEGISLATION—POLICE POWER—Li-  
censes—BARBERING. Laws 1901, p. 349, regulating the business of  
barbering and requiring a license therefor, is not unconstitutional  
as an abridgment of the liberty and natural rights of the citizen;  
since it is a proper health regulation within the police power.  
*State v. Walker*..... 8
2. SAME—STATUTES—INVALIDITY OF PART—EFFECT. The unreason-  
able provision restricting the granting of a license, for the practice  
of the trade of barbering, to apprentices of two years standing, does  
not render unconstitutional the whole act, laws 1901, p. 349, regu-  
lating such trade and requiring a license therefor. *State v.*  
*Walker* ..... 8

CONSTITUTIONAL LAW—CONTINUED.

3. CONSTITUTIONAL LAW—CLASS LEGISLATION—RIGHT TO CONTRACT—  
BROKERS. Laws 1905, p. 110, requiring a broker's contract to be in  
writing is not unconstitutional as class legislation, or as an unwar-  
ranted interference with the right to contract. *Ross v. Kaufman* 678

CONSTRUCTION:

- Of contracts, see CONTRACTS.
- Articles of foreign corporation, right to do trust business, see COR-  
PORATIONS, 11, 12.
- Of order continuing temporary injunction, see INJUNCTION, 2.
- Of city charter, see MUNICIPAL CORPORATIONS, 6.
- Of contract of sale, see SALES, 3.
- Of statutes, see STATUTES, 5, 6.
- Of contract to convey land, see VENDOR AND PURCHASER, 3.
- Of will, see WILLS.

CONTINUANCE:

1. CONTINUANCE—GROUNDS—SURPRISE. Surprise from unexpected  
evidence, as ground for a continuance, is not shown where, three  
months before the trial, an affidavit, used by stipulation as a deposi-  
tion, apprised the party that the fact testified to would arise at the  
trial. *Merrill v. O'Bryan*..... 415

CONTRACTS:

- See ACCORD AND SATISFACTION.
  - For sale of lands, see BROKERS.
  - Compensation of broker, see BROKERS, 3.
  - Limitation of liability of carriers in general, see CARRIERS, 1.
  - Laws as constituting unwarranted interference with right to con-  
tract, see CONSTITUTIONAL LAW, 3.
  - Special damages for breach, issues and proof, see DAMAGES, 3.
  - Admission of parol or extrinsic evidence, see EVIDENCE, 6-8.
  - Agreements within statute of frauds, see FRAUDS, STATUTE OF.
  - Oral agreement affecting separate character of property subse-  
quently acquired, see HUSBAND AND WIFE, 3.
  - Insurable interest of property under contract of sale, see INSUR-  
ANCE, 1.
  - Of employment, see MASTER AND SERVANT, 1, 2, 29.
  - Individual liability on execution by partner, see PARTNERSHIP, 2.
  - Sales of personalty, see SALES.
  - Specific performance, see SPECIFIC PERFORMANCE.
  - Sale of land, see VENDOR AND PURCHASER.
  - Rescission of sale of land, see VENDOR AND PURCHASER, 1, 6.
1. CONTRACTS—ASSENT—FRAUD—EVIDENCE—SUFFICIENCY. A contract  
of employment should not be set aside, one year after it was made,  
on the ground that it was induced by false representations, where  
the plaintiff was a competent business man of varied experience,

**CONTRACTS—CONTINUED.**

no fiduciary relations existed between the parties, and no undue influence was used to induce the contract, but the venture simply did not prove as profitable as expected, and the plaintiff's property sold to the defendant had increased in value. *Stiles v. Simpson*.... 301

2. **CONTRACTS—VALIDITY—PUBLIC POLICY—PUBLIC LANDS—ACQUISITION.** A contract whereby one of the joint occupants of public lands was given sole possession and agreed to acquire title from the government, acknowledging a trust in favor of the other for a one-half interest in the land after acquisition of title, will not be held to be void as contemplating the unlawful acquisition of the land under the homestead laws by fraud and perjury, where the title could be and subsequently was lawfully acquired under the mineral laws, and there was no clear and convincing evidence that a criminal act was intended in entering into the contract. *Waring v. Loomis*. 541

3. **CONTRACTS—CONSTRUCTION—TRIAL—QUESTION OF LAW—EMPLOYMENT OF AGENT.** The construction of a contract of employment is for the court, and it is error to submit it to the jury, where a written contract provided for a salary based on five per cent commission on sales made and allowed the agent to draw \$75 a month "on account," and the undisputed oral evidence, received without objection, showed that the parties had agreed that the agent was guaranteed \$75 per month and expenses to be advanced monthly, and if sales on a basis of five per cent commission amounted to more than the advances, he was to be paid the same at the end of the season; and in such case the agent was not to receive his expenses and \$75 in addition to the commissions. *Peyser v. Western Dry Goods Co.* 55

4. **CONTRACTS—CONSTRUCTION—RESTRICTION ON OCCUPATION—BREACH OF CONDITIONS.** A contract for the sale of a butchering business, which stipulated that the vendor will not enter into such business in the town of A for a period of three years, nor kill any animal except for his private use, is violated where the vendor helped to kill animals for sale in such town and drove a delivery wagon for a rival concern within the stipulated period and territory. *Canady v. Knox* ..... 685

**CONTRADICTION:**

Of witness, see **WITNESSES**, 10-12.

**CONTEMPT:**

As ground for disbarment, see **ATTORNEY AND CLIENT**.

**CONTRIBUTORY NEGLIGENCE:**

See **NEGLIGENCE**, 3, 4, 6.

Alighting from or jumping on moving car as negligence, see **CARRIERS**, 4.

In placing goods in barn threatened by fire, see **FIRES**, 2.

Of servant, see **MASTER AND SERVANT**, 13, 15, 19, 25, 27.

**CONVERSION:**

Wrongful conversion of personal property, see **TROVER AND CONVERSION**.

**CONVEYANCES:**

Of personalty as security for debt, see **CHATTEL MORTGAGES**.

In general, see **DEEDS**.

In fraud of creditors, see **FRAUDULENT CONVEYANCES**.

By husband or wife, see **HUSBAND AND WIFE**, 1, 2.

Trust property, see **TRUSTS**, 2.

**CORPORATIONS:**

Representation by officers and ratification of acts, see **BANKS AND BANKING**, 2-5.

Municipalities, see **MUNICIPAL CORPORATIONS**.

Sufficiency of title of acts relating to corporations and corporate offices, see **STATUTES**, 2.

Taxation of corporations and corporate property, see **TAXATION**, 1, 2.

1. **CORPORATIONS—OFFICERS—CRIMINAL LIABILITY—INFORMATION—DUPLICITY.** An information alleging the violating of a statute as to dealings with "the corporation and its stock," which statute was valid as to dealings with the corporation, but void as to dealings with its stock, is not duplicitous, since it alleges the dealings with the corporation, and the allegations as to dealings with the stock charges no crime and is immaterial. *State v. Merchant*..... 69
2. **SAME—EVIDENCE—CRIMINAL LAW—TRIAL.** Under such an information, it is error, upon evidence that the prosecuting witness bought stock in the corporation and arranged to take charge of one of its offices, to submit the case to the jury on the theory that the defendant would be guilty by reason of the dealings with the stock as well as by reason of the dealings with the corporation. *State v. Merchant* ..... 69
3. **SAME—EVIDENCE—BEST EVIDENCE—CORPORATE CAPACITY.** Upon a prosecution for the violation of a statute relating to dealings with a corporation, it is error to admit, over the defendant's objection, oral evidence of the incorporation of the company. *State v. Merchant* ..... 69
4. **CORPORATIONS—SUBSCRIPTIONS TO STOCK—ACTIONS TO ENFORCE—DEFENSES—ESTOPPEL.** It is no defense to an action by the receiver of an insolvent corporation, brought for the benefit of creditors against stockholders on their unpaid stock subscriptions, that the stock was purchased bona fide as fully paid, that the stock was not fully subscribed, or the corporation a legal one, or that they subscribed on false representations believing that the company was not in debt; defendants being estopped to set up such defenses as to creditors. *Cox v. Dickie*..... 264

## CORPORATIONS—CONTINUED.

5. SAME—NOTICE OF ASSESSMENTS—SUFFICIENCY. Under Bal. Code, § 4262, requiring notice of assessments on unpaid stock to be given personally or by publication, notice by the receiver of an insolvent corporation, given by mailing and publication, as ordered by the court, is sufficient. *Cox v. Dickie*..... 264
6. SAME—ACTIONS—PARTIES. The receiver of an insolvent corporation may join all the stockholders in an action to recover the amount of their unpaid stock subscriptions. *Cox v. Dickie*..... 264
7. SAME—SUBSCRIPTIONS—NAME OF COMPANY. A change in the name of a corporation does not release subscribers to the capital stock, where the subscriptions were given in the name at first intended to be used, but were intended for and in fact subscriptions to the company afterwards incorporated under another name, the two being one and the same company. *Cox v. Dickie*..... 264
8. CORPORATIONS—CONTRACTS—POWERS OF TRUSTEES—SALE OF PROPERTY. Where a mining corporation was formed to "buy, sell . . . and deal in mines," the trustees have power, against the objection of minority stockholders, to sell all its property, consisting of mines upon which had been expended over \$56,000, for the sum of \$50,000, since the sale does not disrupt the corporation and is not contrary to its purposes, which may be proceeded with as well after as before the sale. *Lange v. Reservation Mining & Smelting Co.*... 167
9. CORPORATIONS—DISSOLUTION—SURRENDER OF PRIVILEGES — STATUTE — CONSTRUCTION. A dissolution of a corporation is authorized under Bal. Code, §§ 5780, 5789, 5790, providing that an information may be filed against a corporation which does or omits acts amounting to a surrender of its privileges, and shall be dissolved if found guilty of unlawfully exercising any office, where it appears that the owner of one-half of the stock assumed to represent the corporation without authority, destroyed its business through negligence, is conducting a rival business, and refuses to elect or help elect a trustee, by reason whereof no business can be legally transacted. *State ex rel. Conlan v. Oudin & Bergman Fire Clay Mining and Manufacturing Co.* ..... 196
10. CORPORATIONS—PROCESS—ACTIONS—VENUE — FOREIGN CORPORATION — HAVING NO AGENT IN STATE. Laws 1901, p. 356, § 6, requiring beneficial associations to appoint the state insurance commissioner, at Olympia, their statutory agent upon whom service of process may be made, does not require that actions against them be commenced in Thurston county, when such an association has no office or agent in the state for conducting its general business; Bal. Code, § 4854, requiring actions against a corporation to be commenced in the county where it has an office or any person resides upon whom process may be served not applying in such a case. *Butler v. Supreme Court of Foresters*..... 147

**CORPORATIONS—CONTINUED.**

11. **CORPORATIONS—FOREIGN CORPORATIONS—RIGHT TO DO BUSINESS—ARTICLES—CONSTRUCTION—TRUST COMPANIES.** Articles of a foreign corporation authorizing it "to act as agent in the sale and purchase of real and personal property" do not authorize it to do a trust business, and hence do not require compliance with the provisions relating to trust companies. *State ex rel. University Lumber & Shingle Co. v. Nichols*..... 605
12. **SAME—REAL ESTATE BROKERAGE BUSINESS—STATUTES—CONSTRUCTION.** The proviso to Bal. Code, § 4291, prohibiting a foreign corporation which has among its powers the business of real estate brokerage from carrying on a brokerage business in this state, provides that the prohibition shall not extend to any other business for which it is organized; hence a manufacturing company authorized to do a brokerage business in its home state is entitled to file its articles and do other business in this state. *State ex rel. University Lumber & Shingle Co. v. Nichols* ..... 605

**CORROBORATION:**

Of prosecutrix in prosecution for rape, see RAPE, 2.  
Of witness in general, see WITNESSES, 10, 12.

**COSTS:**

- Review of exceptions to cost bill as dependent on presentation of same by record, see APPEAL AND ERROR, 15.
1. **COSTS — BONDS FOR COSTS — ADDITIONAL SECURITY.** Bal. Code, § 5186, authorizing the court to require an additional cost bond by a nonresident plaintiff "upon proof that the original bond is insufficient security" applies to insufficiency in the amount of the bond as well as to the sufficiency of the sureties. *Morris v. Warwick*. 426
  2. **SAME — DISMISSAL OF ACTION — FAILURE TO FILE COST BOND.** Where a nonresident plaintiff fails to furnish an additional cost bond as required by the court, the action is properly dismissed. *Morris v. Warwick*..... 426

**COUNCIL:**

Remedy against void act of city council in granting franchise, see MUNICIPAL CORPORATIONS, 1.

**COUNSEL:**

See ATTORNEY AND CLIENT.

**COUNTERCLAIM:**

See SETOFF AND COUNTERCLAIM.

**COUNTIES:**

Assessment by commissioners for construction of drainage district, see DRAINS.

**COUNTY COMMISSIONERS:**

Authority to vacate plats of tide lands, see **PUBLIC LANDS**, 3.

**COUNTY ENGINEER:**

Increase of salary and duties, see **OFFICERS**.

Sufficiency of title to act relating to office of county engineer, see **STATUTES**, 4.

**COURTS:**

Review of decisions, see **APPEAL AND ERROR**, 1-3.

Supersedes by supreme court, see **APPEAL AND ERROR**, 13.

Former decision as law of the case on subsequent appeal, see **APPEAL AND ERROR**, 43.

Disbarment proceedings, see **ATTORNEY AND CLIENT**, 1.

Proceedings for alimony, see **DIVORCE**, 5, 6.

Jurisdiction to permit filing of supplemental proof showing service of notice, see **EMINENT DOMAIN**, 21, 22.

Condemnation proceedings, see **EMINENT DOMAIN**.

Jurisdiction to appoint guardian for insane, see **INSANE PERSONS**.

Conclusiveness of judgments, see **JUDGMENT**, 4-6.

Prohibiting judicial proceedings, see **PROHIBITION**.

Trial by court without jury, see **TRIAL**, 6.

**CREDIBILITY:**

Of witness, see **WITNESSES**, 8, 9.

**CREDITORS:**

Of testator, see **WILLS**.

**CRIMINAL LAW:**

See **ADULTERY**; **EXTORTION**; **HOMICIDE**; **RAPE**.

Violation of statute as to officer's dealings with corporation and its stock, see **CORPORATIONS**, 1-3.

Manslaughter, see **HOMICIDE**, 5.

Dismissal of prosecution for delay in filing information, see **INDICTMENT AND INFORMATION**.

Examination of juror, bias, see **JURY**.

Practice of dentistry without license, see **PHYSICIANS AND SURGEONS**, 2, 3.

Trial of civil actions, see **TRIAL**.

Competency, credibility and examination of witnesses, see **WITNESSES**.

1. **CRIMINAL LAW—PARTIES—HOMICIDE—ACCESSORY TO MANSLAUGHTER.** Under Bal. Code, § 6782, abolishing all distinctions between an accessory before the fact and a principal, a person counseling and abetting a manslaughter may be indicted and punished as a principal. *State v. McFadden*..... 259

**CRIMINAL LAW—CONTINUED.**

2. **CRIMINAL LAW — REPUTATION — DEFENDANT — EVIDENCE.** Upon a prosecution for homicide, evidence that the defendant had never before been arrested or accused is inadmissible to establish his general reputation for peace and quiet. *State v. Marfaudille*..... 117
3. **CRIMINAL LAW—DEFENSES—INSANITY—EVIDENCE.** Upon a defense of insanity, where the state sought to show a rational state of mind at a certain time, by a particular statement made by defendant to his daughter, it is error to exclude evidence offered by the defendant as to his daughter's statement to him immediately preceding. *State v. Constantine* ..... 218
4. **SAME—OPINION EVIDENCE—MENTAL CONDITION.** Upon an issue as to the sanity of the accused, a nonexpert witness may give his opinion as to the mental condition of the defendant in his own language; and it is error to strike out an answer that witness could not say whether he was sane or insane but that "his mind was disordered I should say." *State v. Constantine*..... 218
5. **SAME — INSANITY — EVIDENCE.** Upon the defense of insanity claimed to have been brought about by complaints made to him by the defendant's daughter respecting trouble with her husband, it is error to refuse to permit the daughter, who had detailed certain complaints made, to state whether that was the first time she had ever complained to defendant about such troubles. *State v. Constantine* ..... 218
6. **SAME.** Upon an issue as to the sanity of the accused, after the admission of evidence as to statements made by defendant to his attorney just before the commission of the offense, which tended to show defendant's physical and mental condition, it is error to exclude evidence of what the attorney stated to the defendant. *State v. Constantine* ..... 218
7. **CRIMINAL LAW—TRIAL—RIGHT TO JOINT TRIAL.** One jointly indicted has no right to demand that he be jointly tried with his co-defendant, especially where it appears that he was the only real party defendant. *State v. Merchant*..... 69
8. **CRIMINAL LAW—TRIAL—ORDER OF PROOF.** It is error to refuse to allow the defendant to contradict substantive evidence offered by the state as impeaching evidence, but which should have been introduced as part of the state's case in chief. *State v. Constantine*. 218

**CROSS-EXAMINATION:**

See WITNESSES, 8.

**CUSTODY:**

Of children, see DIVORCE, 2

**DAMAGES:**

- For conversion of mortgaged property, see **CHATTEL MORTGAGES**, 5.
- Construction of drainage ditch, see **DRAINS**.
- Compensation for appropriation under power of eminent domain, see **EMINENT DOMAIN**, 3, 4, 18, 19, 23.
- For loss sustained by negligent setting of fire, see **FIRES**, 2.
- In action on injunction bonds, see **INJUNCTION**.
- For logs lost by conversion and by obstruction of stream, see **LOGS AND LOGGING**.
- Excessiveness, reduction or grant of new trial, see **NEW TRIAL**.
- Trial, amendment of complaint in action for personal injuries, see **PLEADING**, 1.
- Action by vendor for breach of contract of sale, see **SALES**, 1, 12.
- In action on injunction bond, instructions, see **TRIAL**, 8.
- Breach by vendor of contract for sale of land, see **VENDOR AND PURCHASER**, 8.

1. **DAMAGES — PERSONAL INJURIES — EXCESSIVENESS.** A verdict for \$1,200 for injury to the knee is not excessive, where eleven months after the injury there was soreness and pain and contraction of muscles preventing the leg from straightening which would require a surgical operation to restore to normal condition. *Cook v. Chehalis River Lumber Co.*..... 619
2. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$5,000, for the loss of two front fingers of the right hand is excessive, and should be reduced to \$2,500. *Barclay v. Puget Sound Lumber Co.* ..... 241
3. **DAMAGES—PLEADING—SPECIAL DAMAGES—ISSUES AND PROOF.** In an action upon a contract, a general counterclaim for damages by reason of nonperformance of the contract, claiming loss of time and money expended, does not admit of recovery for the cost of telegrams incurred and certain other items; since the same were items of special damages that must be specially pleaded. *Sudden & Christenson v. Morse*..... 101
4. **DAMAGES—EARNING CAPACITY—EVIDENCE—ADMISSIBILITY.** In an action for injuries to an employee working as a common laborer, evidence is admissible on the subject of his earning capacity as to his wages while working as a gold miner in another state. *Cook v. Chehalis River Lumber Co.*..... 619

**DANGEROUS MACHINERY AND APPLIANCES:**

See **MASTER AND SERVANT**, 8, 9, 14, 20.

**DEATH:**

Evidence of cause of injury to servant, see **MASTER AND SERVANT**, 10, 11.

**DEBTOR AND CREDITOR:**

See **BANKRUPTCY**; **FRAUDULENT CONVEYANCES**.

**DECEDENTS:**

Estates, see DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS.

Testimony as to transaction with persons since deceased, see WITNESSES, 1-4.

**DECISION:**

On appeal, see APPEAL AND ERROR, 43, 44.

**DECLARATIONS:**

As evidence in civil actions, see EVIDENCE, 2.

Necessity of execution and filing to acquire homestead, see HOMESTEAD, 1.

**DEDUCTION:**

In price for partial failure of title, see VENDOR AND PURCHASER, 3, 4.

**DEEDS:**

Sufficiency of deed as color of title, see ADVERSE POSSESSION, 4.

Cancellation, see CANCELLATION OF INSTRUMENTS.

Reformation, see REFORMATION OF INSTRUMENTS.

Tax deeds, see TAXATION, 3, 4, 7.

Joinder of wife in husband's conveyance of trust property, see TRUSTS, 2.

As notice to purchaser, see VENDOR AND PURCHASER, 5.

1. DEEDS—ACKNOWLEDGMENT. An unacknowledged deed is good as between the parties, and conveys at least equitable title. *Matson v. Johnson* ..... 256
2. SAME—DELIVERY—INTENT. A deed is effective without manual delivery where it was executed by a father to his minor children, during his last sickness, at the time of executing a will of all his other property, and with the expressed intent of conveying the property. *Matson v. Johnson*..... 256

**DEFAMATION:**

See LIBEL AND SLANDER.

**DEFAULT:**

In payment as ground for rescission of contract, see SALES, 4.

**DEFENSES:**

To disbarment proceedings, see ATTORNEY AND CLIENT, 3.

In action by receiver to enforce unpaid subscriptions for stock, see CORPORATIONS, 4.

Insanity as defense to prosecution for homicide, see CRIMINAL LAW, 3-6.

In action to condemn shore rights by boom company, see EMINENT DOMAIN, 10, 13.

**DEFENSES—CONTINUED.**

In suit to enjoin issuance of municipal bonds, see **MUNICIPAL CORPORATIONS**, 9, 10.

In action for price of goods sold, see **SALES**, 7, 9.

In foreclosure of tax lien, see **TAXATION**, 3.

**DELAY:**

Laches, see **EQUITY**.

In making claim for damages in action for breach of warranty, see **SALES**, 12.

**DELIVERY:**

Of deed, see **DEEDS**, 2.

Of goods sold, see **SALES**, 3.

**DEMURRER:**

Waiver of, see **PLEADING**, 6, 7.

**DENTISTS:**

See **PHYSICIANS AND SURGEONS**.

**DEPOSITS:**

In bank, action to recover, see **BANKS AND BANKING**, 1-5.

**DEPOSITS IN COURT:**

Effect of, by garnishee, see **GARNISHMENT**.

Keeping tender good by deposits in court, see **TENDER**.

**DESCENT AND DISTRIBUTION:**

1. **DESCENT AND DISTRIBUTION—PROOF OF HEIRSHIP—EVIDENCE—SUFFICIENCY.** The evidence is sufficient to sustain findings that claimants are next of kin as the only first cousins, where deceased's parentage appeared from records of his parents' marriage, and parish records of baptism of himself and sisters and a brother, the prior death of his father, mother and sisters and brother being clearly shown, and where, a short time before his death, the deceased took out administration upon his sisters' estates, making oath that he was their only heir, and the relationship of the claimants with deceased's family was shown by satisfactory evidence, while the testimony of other claimants was largely traditional, and failed to establish the identity of their ancestor with that of deceased's. *In re Sullivan's Estate*..... 631
2. **SAME—NEXT OF KIN—COUSINS—DEGREES—STATUTES—CONSTRUCTION.** First cousins take to the exclusion of second cousins under Bal. Code, § 4620, subd. 5, providing that in the absence of issue, husband, wife, father, mother, brothers or sisters, the estate shall go to the next of kin, in equal degree, excepting that, of collateral kindred claiming through different ancestors, those claiming through the nearest ancestor shall be preferred. *In re Sullivan's Estate*. 631

**DESCRIPTION:**

Reformation of deed for mistake in description, see REFORMATION OF INSTRUMENTS.

Of person or property in summons for foreclosure sale, see TAXATION, 4, 6.

**DILIGENCE:**

In use of waters obtained by appropriation, see WATERS AND WATER COURSES, 3.

**DISABILITIES:**

Effect on limitation, see LIMITATION OF ACTIONS.

**DISBARMENT:**

Of attorney, see ATTORNEY AND CLIENT.

**DISCHARGE:**

In bankruptcy, see BANKRUPTCY, 2.

Tender after default of amount due as discharge of mortgage lien, see CHATTEL MORTGAGES, 7.

Of bankrupt as affecting judgment taken because of fraud, see JUDGMENT, 5.

From employment, see MASTER AND SERVANT, 3.

**DISCOVERY:**

1. DISCOVERY—INTERROGATORIES—ANSWERS—SUFFICIENCY. It is not error to deny an application for specific answers to each of 160 interrogatories, where those relating to a single matter were grouped and fully answered by one answer and the defendant was sufficiently informed to prepare its defense. *Pearce v. Greek Boys' Mining Co.* ..... 38

**DISCRETION OF COURT:**

Review in civil actions, see APPEAL AND ERROR, 24, 39.

Award of community property, see DIVORCE, 3.

To cure defect in proof of service of notice, see EMINENT DOMAIN, 21.

Amendment of pleadings in action for personal injuries, see MASTER AND SERVANT, 17.

Adding new parties by complaint in intervention, see PARTIES, 1.

**DISMISSAL AND NONSUIT:**

Appealability of order refusing dismissal, see APPEAL AND ERROR, 3.

Dismissal of appeal, see APPEAL AND ERROR, 4, 5, 10, 21, 22.

For failure to give security for costs, see COSTS.

Judgment of dismissal as *res adjudicata*, see JUDGMENT, 6.

Right to prohibition after error in refusing voluntary dismissal, see PROHIBITION.

**DISMISSAL AND NONSUIT—CONTINUED.****1. DISMISSAL AND NONSUIT—VOLUNTARY—SETOFF AND COUNTERCLAIM.**

The plaintiff is not entitled to dismiss his action to quiet title, claimed under a certain land contract, alleged to have been fraudulently assigned to defendant, after answer by the defendant setting up title in himself by virtue of the assignment of the contract and conveyance thereunder, and praying that his title be quieted; since the answer is a counterclaim connected with the subject of the action and arises out of the same contract or transaction set out in the complaint. *Gray v. Granger*..... 442

**DISSOLUTION:**

Of attachment, see ATTACHMENT, 2-4.

Of corporation, see CORPORATIONS, 9.

**DISTRIBUTION:**

Of estate of decedent, see DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS, 5, 6.

**DISTRICTS:**

Drainage districts, see DRAINS.

**DITCHES:**

See DRAINS.

**DIVERSION:**

Of water course, see WATERS AND WATER COURSES, 3, 4.

**DIVORCE:**

As affecting adverse holding of community property, see ADVERSE POSSESSION, 6.

**1. DIVORCE—ADULTERY—CONDONATION.** Where condonation of acts of adultery was conditional, a breach of the condition works a revival of the offense. *Cozard v. Cozard*..... 124**2. SAME—CUSTODY OF CHILDREN.** In granting a divorce on the ground of adultery of the wife, a decree granting the custody of the children to the husband is warranted where the wife's conduct showed that she was not a proper person to have their custody. *Cozard v. Cozard*..... 124**3. SAME—DECREE—AWARD OF COMMUNITY PROPERTY.** Upon granting a divorce to a husband and awarding him the custody of four children, it is not an abuse of discretion to award to him one-half of the community property, valued at \$2,500, and one-half to the children, he to pay the wife \$250. *Cozard v. Cozard*..... 124**4. SAME—SUPPORT OF CHILDREN.** A wife, divorced on the ground of adultery, cannot complain that the court had no power to award one-half of the community property to four minor children, whose custody was awarded to the husband, since the court could have awarded it to the husband for their support. *Cozard v. Cozard*. 124

**DIVORCE—CONTINUED.**

5. **DIVORCE—TEMPORARY ALIMONY—ALLOWANCE BY FOREIGN COURT—ENFORCEMENT.** An action does not lie in this state to recover temporary alimony upon an order therefor made in an action of divorce in another state, although appealable as a final order under the laws of such state; since it is subject at all times to modification in the foreign court. *Van Horn v. Van Horn*..... 388
6. **DIVORCE—ALIMONY—APPEAL—SUPERSEDEAS—RIGHT TO MANDAMUS.** Upon appeal from that portion of a decree of divorce awarding alimony and directing the surrender of property, the appellant has a statutory right to a supersedeas pending appeal; and mandamus will lie to compel the superior court to fix the amount of the supersedeas bond. *State ex rel. Holcomb v. Yakey*..... 419

**DOCUMENTS:**

As evidence in civil actions, see EVIDENCE, 3, 4.

**DRAFTS:**

Liability of customer to bank on forged draft, see BANKS AND BANKING, 6.

**DRAINS:**

1. **DRAINS—ASSESSMENTS—AMOUNT—BENEFITS TO PROPERTY—MANDAMUS.** In proceedings to assess property for benefits accruing by reason of the construction of a drainage district, the county commissioners have no power to assess property in excess of the benefits received; and in the absence of fraud, they cannot be compelled by mandamus to increase their assessment for benefits so as to cover the total cost of the work and interest. *State ex rel. Espy Estate Co. v. Board of Commissioners of Pacific County*..... 230
2. **SAME—PROCEEDINGS UNDER CURATIVE ACT—LEVY OF ASSESSMENT—EFFECT OF FORMER VOID PROCEEDINGS.** Where the proceedings for the assessment of property for a drainage district were void, and the legislature, recognizing the moral obligation of the lands benefited, provided a method for making the cost a lien thereon, the county commissioners in making a new assessment are not bound by the acts of the former board, but must determine the amount of benefits to be assessed. *State ex rel. Espy Estate Co. v. Board of Commissioners of Pacific County*..... 230

**EJECTMENT:**

Review of claim for taxes paid, presentation of grounds, see APPEAL AND ERROR, 7.

Right of innocent purchaser to assert lien in action for ejectment, see MONEY PAID.

1. **EJECTMENT—TITLE OF PLAINTIFF.** In an action of ejectment plaintiff must recover on the strength of his own title. *Bryant Lumber & Shingle Mill Co. v. Pacific Iron & Steel Works*..... 574

## EJECTMENT—CONTINUED.

2. SAME—PRIMA FACIE TITLE—PRIOR POSSESSION. In an action of ejectment, where neither party had title, the plaintiff does not make out a case of *prima facie* title by prior possession by showing that defendants obtained permission of the plaintiff to continue an occupancy, when it appears that defendants had possession prior to the making of an unwarranted claim to the land by the plaintiff, who never had any possession. *Bryant Lumber & Shingle Mill Co. v. Pacific Iron & Steel Works*..... 574

## ELECTION:

Submission of question of municipal expenditures in general, see MUNICIPAL CORPORATIONS, 7.

## EMINENT DOMAIN:

Cessation of controversy as affecting right to allege error, see APPEAL AND ERROR, 6.

Construction of drainage ditch, see DRAINS.

Maps as illustrative evidence in condemnation by railroad, see EVIDENCE, 4.

1. EMINENT DOMAIN—PROPERTY DEVOTED TO PUBLIC USE—NECESSITY. A Congressional grant of a railroad right of way of a certain width is not conclusive of the fact that the entire width was necessary for the purposes of the railroad, as against another railroad seeking to condemn a portion thereof for public purposes. *North Coast R. v. Northern Pacific R. Co.*..... 529
2. SAME. The right of eminent domain under state laws may be exercised by a railroad company to condemn a longitudinal portion of a right of way granted by Congress to another railroad company, if public necessity therefor exists and the occupying railroad does not require the portion taken. *North Coast R. v. Northern Pacific R. Co.* ..... 529
3. SAME—COMPENSATION—RAILROADS—GRANTS. A railroad company seeking to condemn a portion of the right of way of another railroad through a mountain pass, seeking to acquire a tract outside of the roadbed of the other company, is not relieved from paying compensation by virtue of U. S. Stat. at Large, ch. 152, p. 482, § 2, providing for common usage and occupancy by railroad companies of roadbeds through a canyon, pass, or defile, since no common usage is sought. *North Coast R. v. Northern Pacific R. Co.*..... 529
4. SAME—WAIVER OF OBJECTION TO DAMAGES. Where a petitioner in condemnation proceedings asks that the damages be ascertained, it cannot contend, upon review by certiorari, that no damages can be awarded by reason of petitioner's right of common usage. *North Coast R. v. Northern Pacific R. Co.* ..... 529

## EMINENT DOMAIN—CONTINUED.

5. SAME—NECESSITY FOR TAKING RAILROAD RIGHT OF WAY—EVIDENCE—SUFFICIENCY. A reasonable public necessity, authorizing the condemnation of a longitudinal portion of a railroad right of way through a mountain pass for three-fifths of a mile, appears where the same is wanted for a railroad right of way through the pass, there being no other way except by the construction of a tunnel, costing \$200,000, or by crossing a swift mountain stream twice and using unsafe substructure through low lands swept by floods, involving a much greater expenditure of money than the other route and increased dangers to the public. *North Coast R. v. Northern Pacific R. Co.*..... 529
6. SAME. A finding that double tracks of a transcontinental railroad through a mountain pass, where but one track has been used, will answer the necessity of future needs, is justified by evidence that the company is constructing another line of railway for the purpose of relieving the present single track of through traffic. *North Coast R. v. Northern Pacific R. Co.*..... 529
7. SAME—ORDER OF CONDEMNATION—MODIFICATION. Upon condemnation of a longitudinal portion of a railroad right of way through a mountain pass, an order of condemnation of a strip commencing twenty-five feet from the center of the present track in case the grade thereof is not raised within one year, and commencing forty-five feet from the center of the track if the grade is raised, will be modified, on certiorari, making it forty-five feet unconditionally, where it appears that the same will answer all the purposes of the petitioner. *North Coast R. v. Northern Pacific R. Co.*..... 529
8. SAME. An order condemning a railroad right affecting a highway, requiring the petitioner to relocate and remove the highway within a limited time, will be modified, on certiorari, where there appears no necessity for such time limit. *North Coast R. v. Northern Pacific R. Co.*..... 529
9. EMINENT DOMAIN—PETITION—DESCRIPTION OF PROPERTY—BOOM COMPANIES. In condemnation proceedings by a boom company, the petition sufficiently describes the property sought to be taken, where the facts are alleged as to its present and proposed construction of its boom, that the relators' lands, described by reference to government surveys, are contiguous thereto, and condemnation is asked of certain definite shore rights and privileges appurtenant to said lands, where it is not sought to take any lands by metes and bounds. *State ex rel. Burrows v. Superior Court.*..... 277
10. SAME—DEFENSES—INSUFFICIENCY OF PROPERTY. Condemnation of certain shore rights and privileges for the use of a boom company cannot be objected to on the ground that the rights to be condemned

## EMINENT DOMAIN—CONTINUED.

- are not sufficient to enable it to transact its public business without the use of other property belonging to the defendants. *State ex rel. Burrows v. Superior Court*..... 277
11. SAME—PROPERTY SUBJECT. Riparian rights and privileges appurtenant to the shore line of a navigable river are property, subject to condemnation for the use of a public service boom company. *State ex rel. Burrows v. Superior Court*..... 277
  12. SAME—LOGS AND LOGGING—BOOM COMPANIES. Where a boom company's plat was made from the government field notes of the meanders of a river, and shows the contiguous land, it is sufficient to authorize condemnation proceedings to appropriate the use of an unmeandered slough extending into such contiguous lands, within Bal. Code, § 4379, requiring the map to show such of the shore lines of waters and contiguous lands as are proposed to be appropriated. *State ex rel. Burrows v. Superior Court*..... 277
  13. SAME—PROCEEDINGS—DEFENSES—ATTEMPT TO PURCHASE. Defendants who denied the right of a boom company to appropriate their property cannot raise the objection that the company did not first attempt to acquire its rights by purchase. *State ex rel. Burrows v. Superior Court* ..... 277
  14. SAME—PUBLIC USE. The fact that no logging is being done upon a stream except by a corporation whose stockholders are identical with those of a boom company, does not show that condemnation of a boom site by such corporation is for a private use. *State ex rel. Burrows v. Superior Court*..... 277
  15. EMINENT DOMAIN—RIPARIAN RIGHTS—LOGS AND LOGGING—STATUTES—CONSTRUCTION. Under Bal. Code, § 4388, conferring upon boom companies the right to condemn "shore rights and other property upon the river," and § 4390 providing that it shall be unlawful to take "lands or sloughs" within territory of certain remonstrancers, a remonstrance does not affect the company's power to condemn a right to maintain splash dams some miles up the river above the lands of the remonstrancers, as none of their "lands or sloughs" are sought to be appropriated. *State ex rel. Burrows v. Superior Court* ..... 286
  16. EMINENT DOMAIN—HIGHWAYS—ESTABLISHMENT. Upon assessment of damages for the condemnation of lands abutting on a public highway, it is immaterial whether the owner's rights in the use of the roadway are based upon establishment of the highway by prescriptive use or by dedication. *Portland and Seattle R. Co. v. Clarke County* ..... 509
  17. SAME—TRIAL—INSTRUCTIONS—CONSISTENCY. In such a case, an instruction that no owner of land adjoining a public highway has a right to interfere with public travel, and an instruction that he may

EMINENT DOMAIN—CONTINUED.

make temporary and reasonable use thereof for the purpose of loading and unloading goods, are not prejudicially inconsistent, when construed together. *Portland and Seattle R. Co. v. Clarke County* 509

18. SAME—DAMAGES—INSTRUCTIONS—VALUE OF LANDS. In proceedings to condemn a railroad right of way through lands upon which there was a stone quarry on a bluff adjacent to a highway, it is proper to refuse to instruct that there was no evidence that the highway depreciated the value of the lands, where it appeared that care was required in blasting in the quarry near the highway, and it was claimed by defendants that much greater care would be necessary in blasting after construction of the railway. *Portland and Seattle R. Co. v. Clarke County*..... 509
19. SAME—ADEQUACY OF DAMAGES—REVIEW. A verdict for \$15,000 damages for land taken for a railroad right of way will not be set aside on appeal as inadequate, where there was much conflict in the evidence, the jury and judge viewed the premises, and the trial court denied a motion for a new trial, and the verdict appears to do substantial justice. *Portland and Seattle R. Co. v. Clarke County* ..... 509
20. EMINENT DOMAIN—APPEAL—DECISIONS REVIEWABLE—CERTIORARI. No appeal lies from an order in condemnation dismissing proceedings by a county to condemn property for a county road, there being no statute authorizing an appeal and the remedy being by certiorari. *Whatcom County v. Yellowkanim*..... , 90
21. EMINENT DOMAIN—PROCEEDINGS—NOTICE—PROOF OF SERVICE—PROCESS—SUPPLEMENTAL PROOF. It is discretionary on motion to quash a service of notice in condemnation proceedings for inadequate proof, to permit the filing of a supplementary affidavit showing proper service, where the first affidavit was technically insufficient in that the party making the service was shown to be twenty-one years of age when sworn, and not when the service was made, two days earlier. *Spokane Interurban R. Co. v. Connelly*..... 515
22. SAME—JURISDICTION ON DEFECTIVE PROOF—STATUTES—CONSTRUCTION. In condemnation proceedings, Bal. Code, § 5638, providing that due proof of service of notice must be filed before or at the time of presenting the petition, does not affect the jurisdiction of the court to allow the filing of further proof of service to cure a technical defect, where the party had been actually duly served, in view of the further provision that all persons served with notice shall be bound by subsequent proceedings. *Spokane Interurban R. Co. v. Connelly* ..... 515
23. EMINENT DOMAIN—DAMAGES—TO LANDS NOT TAKEN—SPECIAL FINDING—EFFECT. Upon an award of damages to land by the erection of a dam, depriving the owner of the benefit of a fall of six feet causing a swift current through his land, a special finding of the

**EMINENT DOMAIN—CONTINUED.**

jury that the current was of no value as a water power for purposes of irrigating lands not taken, is conclusive upon the question as to the depreciation in value of the lands sought to be irrigated, where the issue was as to whether such current could be utilized for that purpose; and it was accordingly not error to exclude evidence of the depreciation in the value of the lands not taken which were to be irrigated. *Inland Empire R. Co. v. McKinley*..... 675

24. **SAME—WATER POWER APPURTENANT TO LANDS.** Upon condemnation of lands to be overflowed by the erection of a dam, which would deprive the owner of a swift current through his land valuable as a water power, the current is an appurtenant to the lands actually taken, for which damages are to be assessed with the land, and is not an appurtenant to other land not taken where the power had not been developed and made appurtenant to such other lands. *Inland Empire R. Co. v. McKinley*..... 675

**EMPLOYEES:**

See MASTER AND SERVANT.

**EMPLOYMENT:**

Of broker to sell land, see FRAUDS, STATUTE OF.

Of servant by master, see MASTER AND SERVANT, 4.

**ENTRY:**

Of judgment, see JUDGMENT, 1.

**EQUALITY:**

Of assessment for taxation, see TAXATION, 1.

**EQUITY:**

See CANCELLATION OF INSTRUMENTS; INJUNCTION; REFORMATION OF INSTRUMENTS; SPECIFIC PERFORMANCE; TRUSTS.

Reviewability of suits in equity, see APPEAL AND ERROR, 1.

Suit to quiet title, see QUIETING TITLE.

1. **EQUITY—LACHES—TENANCY IN COMMON—PARTITION.** An action by a divorced wife for partition of community property, in possession of the husband as a tenant in common, is not barred by laches, where the husband had collected rents and paid taxes for thirteen years, and there had been no accounting and no improvements made since the divorce. *Graves v. Graves*..... 664

**ESCROWS:**

Contract of sale, effect on insurable interest of noncompliance of conditions of delivery, see INSURANCE, 1, 2.

**ESTABLISHMENT:**

Of homestead, see HOMESTEAD, 1.

**ESTOPPEL:**

- To assert invalidity of agreement, see ACCORD AND SATISFACTION.
- Right to raise question for first time on appeal, see APPEAL AND ERROR, 7, 23.
- To deny agreement to pay commissions on sale of land, see BROKERS, 3.
- To deny validity of stock subscription, see CORPORATIONS, 4.
- To object to mode of payment, see TENDER, 1.
- To excuse nonperformance of contract, see VENDOR AND PURCHASER, 2.

**EVIDENCE:**

- Of adverse possession, see ADVERSE POSSESSION, 2, 3, 6, 7.
- Hostile character of possession, see ADVERSE POSSESSION, 6.
- Review of rulings as dependent on presentation of objection in lower court, see APPEAL AND ERROR, 8.
- Review of rulings as dependent on presentation by record, see APPEAL AND ERROR, 18.
- Review of rulings as dependent upon prejudicial nature of error, see APPEAL AND ERROR, 28-31.
- Conclusiveness of findings or verdict on sufficient or conflicting evidence, see APPEAL AND ERROR, 32-38.
- Admissibility to show authorized establishment of branch bank, see BANKS AND BANKING, 1-3.
- Employment of broker, see BROKERS, 1, 2.
- In suit for cancellation of instruments, see CANCELLATION OF INSTRUMENTS.
- Contributory negligence of passenger, see CARRIERS, 4.
- In action to charge first mortgagee with proceeds of property, see CHATTEL MORTGAGES, 1.
- Unexpected evidence, showing as ground for continuance, see CONTINUANCE.
- of validity of contract, see CONTRACTS, 1.
- In prosecution of offense relating to dealings with corporation, see CORPORATIONS, 2, 3.
- In criminal prosecutions, see CRIMINAL LAW, 2-6.
- Order of proof in criminal prosecution, see CRIMINAL LAW, 8.
- Of earning capacity in action for personal injuries, see DAMAGES, 4.
- Sufficiency of proof of heirship, see DESCENT AND DISTRIBUTION.
- Necessity for condemnation of railroad right of way by other railroad company, see EMINENT DOMAIN, 5, 6.
- Of fraud and conspiracy in execution sale, see EXECUTION, 1.
- Of negligence in burning slashing, see FIRES, 1.
- Admissibility to show title, see FORCIBLE ENTRY AND DETAINER.
- Of oral authority to make binding contract of sale, see FRAUDS, STATUTE OF, 1.
- Admissibility in prosecution for homicide, see HOMICIDE, 3, 4.
- Of agreement as to separate nature of property, see HUSBAND AND WIFE, 4.

## EVIDENCE—CONTINUED.

- Of fraud in issuance of patent to Indians, see INDIANS, 3.
  - Of tribal relations, see INDIANS, 2.
  - In action on injunction bonds, see INJUNCTIONS, 5, 6.
  - Admissibility to contradict recitals conclusive of question, see JUDGMENT, 5.
  - Of payment in action of unlawful detainer, see LANDLORD AND TENANT, 4.
  - To show maintenance of nuisance by tenant, see LANDLORD AND TENANT, 2.
  - Relation of landlord and tenant, see LANDLORD AND TENANT, 1.
  - For libel, see LIBEL AND SLANDER, 2.
  - Of marriage, see MARRIAGE.
  - For injuries to servant, see MASTER AND SERVANT, 8-12, 16, 18, 21, 22, 26, 29.
  - Of employment and services, see MASTER AND SERVANT, 4.
  - To show contributory negligence, see NEGLIGENCE, 6.
  - To sustain conviction for practicing dentistry without a license, see PHYSICIANS AND SURGEONS, 2.
  - Admission as waiver of objection by demurrer, see PLEADING, 6.
  - In prosecution for rape, see RAPE.
  - In suit to reform written instrument, see REFORMATION OF INSTRUMENTS.
  - Of fraud in sale of stock of goods, see SALES, 2.
  - For price of goods sold, see SALES, 8, 9, 11.
  - Reception at trial, see TRIAL, 1, 2, 6.
  - Questions of fact for jury, see TRIAL, 4.
  - Rulings on trial by court, see TRIAL, 6.
  - In action for conversion, see TROVER AND CONVERSION, 1, 2.
  - To establish trust, see TRUSTS, 1.
  - To show nonperformance of contract, see VENDOR AND PURCHASER, 1.
  - In corroboration of offer to cure defect in title, see VENDOR AND PURCHASER, 7.
  - Competency, attendance, credibility and examination of witnesses, see WITNESSES.
1. EVIDENCE—RELEVANCY—SIMILAR TRANSACTIONS. Upon an issue as to whether an agent in the purchase of a vessel had procured the report of a consulting engineer as to the vessel's condition, it is prejudicial error to allow the principal to show that a telegraphic report of a general nature was not the character of report intended by the contract, and to introduce evidence of a written report made by the same engineer as to the condition of another vessel, where the agent had not agreed to obtain such a report and had no knowledge of the former report. *Sudden & Christenson v. Morse*..... 101
  2. EVIDENCE—DECLARATIONS OF PARTNER—AUTHORITY. Upon a sale of lumber to a nontrading partnership, the declaration of the partner making the purchase that the lumber was to be used, and was

EVIDENCE—CONTINUED.

- used, to build a warehouse for the company's business is not inadmissible, but is a fact concerning the business, which may be shown. *Merrill v. O'Bryan*..... 415
3. EVIDENCE—DOCUMENTARY—COPIES. A certified copy of a recorded instrument is admissible in evidence as an admission. *Pearce v. Greek Boys' Mining Co.*..... 38
4. EVIDENCE—DOCUMENTARY—MAPS. In a condemnation proceeding, maps showing the location of the railroad are admissible as illustrative of the evidence of the witnesses, where they are shown to be accurate by witnesses who had scaled the maps and compared them with the government field notes, although such witnesses had not surveyed the ground or made the maps. *Portland and Seattle R. Co. v. Clarke County*..... 509
5. EVIDENCE—WRITING—PART OF INSTRUMENT—APPEAL—REVIEW. It is not error to admit in evidence only part of an assignment of a cause of action, where the detached part was excluded at the instance of the appellant as improper, and sufficient appears to show respondent's right to sue. *Ames v. Farmers and Mechanics Bank* 328
6. EVIDENCE—PAROL—TO VARY WRITING. A stranger to a written contract, cannot, in a controversy with one of the parties thereto, object to oral evidence on the ground that it contradicts the terms of the writing. *Bright v. Hanover Fire Insurance Co.*..... 60
7. EVIDENCE—PAROL EVIDENCE TO VARY WRITING—SALES—WAIVER OF VERBAL AGREEMENT. Upon the sale of a safe by a written order, which expressly waived all claims for verbal agreements not embodied in the writing, and which was addressed to, and subject to the approval of, the home office at C., it is incompetent for the vendee to show a verbal agreement that the safe was to be shipped immediately from an agency at P., and was purchased only on such condition. *Victor Safe & Lock Co. v. O'Neil*..... 176
8. EVIDENCE—PAROL—WRITTEN CONTRACT—VENDOR AND PURCHASER—TITLE—SUFFICIENCY—EXCUSE FOR NONPERFORMANCE. Parol evidence is admissible to show that a written contract for the sale of land had been induced by the vendee's agent, who knew that the vendors would sell only for cash to be paid at once, by representing that the vendees would take the land subject to the claims of squatters and expedite the sale without the delay incident to a suit for their removal from the land, although the same was not embraced in the contract, which called for a good title; knowledge of the agent being imputed to the vendee; and possession by such squatters would be no excuse for failure to comply with the contract. *Allen v. Treat* 552
9. EVIDENCE—PAROL—WRITTEN INSTRUMENT. A written release of two causes of action for personal injuries, for the expressed consideration of \$2,000, without reciting how much was paid in settlement of either claim, is not varied or contradicted by parol evidence

## EVIDENCE—CONTINUED.

that the whole sum was paid in settlement of the second cause of action, and that the first was of a trifling nature and ill founded; which evidence is therefore admissible. *Moran Brothers Co. v. Pacific Coast Casualty Co.*..... 592

10. EVIDENCE—OPINIONS—MARKET VALUE. The owner of premises is not always competent to testify as to the market value of his real property. *Port Townsend Southern R. Co. v. Nolan*..... 382

## EXAMINATION:

Of juror for bias, see JURY.

Of applicant for practice of dentistry, see PHYSICIANS AND SURGEONS.

Of witnesses in general, see WITNESSES.

## EXCEPTIONS, BILL OF:

Necessity for purpose of review, see APPEAL AND ERROR, 14-17.

Presentation and reservation of grounds of review in record, see APPEAL AND ERROR, 14-17.

## EXCESSIVE DAMAGES:

See DAMAGES, 1, 2; LOGS AND LOGGING.

Remission or grant of new trial, see NEW TRIAL.

## EXECUTION:

See ATTACHMENT; GARNISHMENT.

Exemptions from execution of real property as homestead, see HOMESTEAD, 2.

By wife of mortgage of husband's separate property, see HUSBAND AND WIFE, 1.

1. EXECUTION—WRONGFUL SALE—CONSPIRACY TO DEFRAUD—EVIDENCE—SUFFICIENCY. The fact that, at an execution sale, the purchaser did not pay the sheriff until four days thereafter, or that the execution debtor claims that he was not served with process in the action (although liable for the indebtedness and having notice of the action brought against him and others as partners), does not constitute proof of fraud in the sale or support an action for wrongful execution or conspiracy to defraud. *Eaid v. Connolly*..... 584
2. EXECUTION—REQUISITES—OBJECTIONS. An execution commencing, "State of Washington, Clallam County, ss: To the sheriff of Clallam County, Greeting:" will not be held void because not running in the name of the state, where no objection was made to the confirmation of the sale. *Pederson v. Lease*..... 253
3. SAME—NAME OF DEFENDANT—IDEM SONANS. An execution against "Peter Peterson" whose true name was Peder Pederson, but who was sued as Peter Pederson and was commonly known as Peter Peterson, will not invalidate a sale thereunder, but is controlled by the rule of *idem sonans*. *Pederson v. Lease*..... 253

## EXECUTION—CONTINUED.

4. SAME—SALE—OBJECTIONS. An execution sale will not be invalidated by failure of the execution to state the amount due or to command the sheriff to levy upon real property upon which the judgment is a lien, where no objection to confirmation was made and the purchaser had held the property and paid the taxes for twelve years. *Pederson v. Lease*..... 253

## EXECUTORS AND ADMINISTRATORS:

See WILLS.

Certiorari to review order for widow's allowance, see CERTIORARI, 1.  
Competency of witnesses to testify to transactions with decedent, see WITNESSES, 1.

1. EXECUTORS AND ADMINISTRATORS—ADMINISTRATION—NECESSITY. There is no justification for administration with the will annexed, in this state, thirteen years after the death of the testator, where he died in a sister state, and the widow was appointed executrix in that state, notice to creditors was duly given there, her accounts approved, and nothing remained to be done there except to distribute the estate according to the law of that state vesting the same in the devisees. *State ex rel. Speckart v. Superior Court*..... 141
2. SAME—ALLOWANCE TO WIDOW. An allowance to a widow for support pending administration cannot be granted thirteen years after the death of the testator, after ample allowances in another state under proceedings which were not closed up by final distribution owing to the neglect of the widow. *State ex rel. Speckart v. Superior Court* ..... 141
3. EXECUTORS AND ADMINISTRATORS—CLAIMS—NECESSITY OF PRESENTATION. Under Bal. Code, § 6199a, creditors must present their claims to the executor of a nonintervention will within one year after publication of notice to creditors, as in other cases, or they will be barred. *Foley v. McDonnell*..... 272
4. SAME—FAILURE TO PRESENT CLAIMS—PRESUMPTION—PLEADING. The law presumes that the executor of a nonintervention will will seasonably publish notice to creditors, as required by statute, and a complaint upon a claim is demurrable where the action was not commenced until five years after testator's death, and there is no allegation that notice to creditors was not given, or any excuse shown for the delay. *Foley v. McDonnell*..... 272
5. EXECUTORS AND ADMINISTRATORS—APPEAL—RIGHT TO APPEAL FROM DISTRIBUTION. An administrator has an appealable interest in an order of final distribution of an estate, since it is his duty to guard against error in distribution without ample provision for obligations of the estate. *In re Sullivan's Estate*..... 631

## EXECUTORS AND ADMINISTRATORS—CONTINUED.

6. EXECUTORS AND ADMINISTRATORS—FINAL—DISTRIBUTION—PROVISION FOR DEBTS. An order of final distribution of an estate, requiring all real and personal property except cash on hand to be turned over to the distributees at once, will, on appeal by the administrator, be modified so as to decree distribution subject to the charge for final settlement purposes, where more than a year has elapsed since the filing of the report showing the cash on hand, which cash may not be ample for all purposes of final settlement. *In re Sullivan's Estate* ..... 631
7. EXECUTORS—SALES—BONA FIDE PURCHASERS. The rule of caveat emptor applies to purchasers at an executor's sale of real property, who take only the interest of the estate. *Matson v. Johnson*.... 256
8. EXECUTORS AND ADMINISTRATORS—SALES—CONFIRMATION—VACATION—IRREGULARITIES. Where, pending confirmation of an inadequate bid at an executor's sale, an upset bid was made, misleading the executor to think that the sale would not be confirmed, withdrawal of the upset bid and confirmation of the sale without notice to the executor, at a time when higher bids were available, constitutes an irregularity warranting vacation of the order of confirmation. *In re Holburte's Estate* ..... 378
9. EXECUTORS AND ADMINISTRATORS—SETTLEMENT—EFFECT—SUBSEQUENT ORDERS—JUDGMENT—RES JUDICATA. The settlement of a so-called final account of an administrator, does not preclude him from asserting, as an individual, error in subsequent orders affecting his relation to the estate since the making of the orders. *In re Sullivan's Estate* ..... 631

## EXEMPTIONS:

- Exemption of property as ground for dissolution of attachment, see ATTACHMENT, 2.
- Exemption from forced sale of real property as homestead, see HOMESTEAD, 2.

## EXPLOSIVES:

- Negligence in deposit of dynamite caps so as to attract children, see NEGLIGENCE, 1.

## EXTORTION:

1. EXTORTION—THREATS—ELEMENTS OF OFFENSE—COMMON LAW OFFENSES. Under the common law, it was not an indictable offense to extort money by threatening to institute a criminal prosecution against the party defrauded, since the threat is not of personal violence or such as to overcome a firm and prudent man. *State v. Nethercutt* ..... 105

## FACTORY ACT:

- Guarding dangerous machinery, see MASTER AND SERVANT, 14, 20-23.

**FALSE REPRESENTATIONS:**

Affecting validity of sale of personalty, see SALES, 1, 2.

**FELLOW SERVANTS:**

See MASTER AND SERVANT, 16, 28.

**FILING:**

Statement of facts in lower court, see APPEAL AND ERROR, 20.

Dismissal of action on failure to file additional cost bond, see COSTS, 2.

Proof of service of notice, see EMINENT DOMAIN, 21, 22.

Criminal information or complaint, see INDICTMENT AND INFORMATION.

Amended notice of lien, see MECHANICS' LIENS, 3.

**FINDINGS:**

Review on appeal or writ of error, see APPEAL AND ERROR, 36-38.

Necessity of recital as to reasonable cause upon dissolution of attachment, see ATTACHMENT, 4.

Special findings of damage to land not taken, see EMINENT DOMAIN, 23.

**FIRE INSURANCE:**

See INSURANCE, 1-3.

**FIRES:**

Insurance against loss by fire, see INSURANCE, 1-3.

1. **FIRES—NEGLIGENCE—EVIDENCE—SUFFICIENCY.** The evidence sustains a finding that defendants were guilty of negligence in burning a slashing during the driest time of the year where there had been no rain for two months and there was much combustible material in the neighborhood, although plaintiff's adjoining property was separated from the slashing by a creek and a strip of green timber. *Ulrich v. Stephens*..... 199
2. **SAME—DAMAGES—CONTRIBUTORY NEGLIGENCE—FINDINGS—CONSISTENCY.** A finding that plaintiff was guilty of contributory negligence in replacing in a barn, threatened by fire, movable articles taken therefrom, after they supposed the danger from fire was over, is not inconsistent with the allowance of damages for the loss of the barn and the hay therein that could not be readily removed. *Ulrich v. Stephens* ..... 199

**FORCIBLE ENTRY AND DETAINER:**

Action for unlawful detainer of leased premises, see LANDLORD AND TENANT, 3, 4.

1. **FORCIBLE ENTRY AND DETAINER—EVIDENCE OF TITLE—JUDGMENT—ADMISSIBILITY.** In an action of unlawful detainer, a foreclosure judgment establishing a clear legal title in the plaintiff is admissible in

**FORCIBLE ENTRY AND DETAINER—CONTINUED.**

evidence, although the defendant was not a party to the foreclosure and his equities were not affected thereby; since his claim of paramount title fails if he does not establish any of his affirmative defenses. *McMillan v. Walker*..... 342

**FORECLOSURE:**

Of mechanics' lien, see **MECHANICS' LIENS**.

Of tax lien, see **TAXATION**, 3-7.

**FOREIGN CORPORATIONS:**

See **CORPORATIONS**, 10, 11.

**FORFEITURES:**

Of lands granted to railroads, see **PUBLIC LANDS**, 2.

**FORGERY:**

Payment of forged paper by bank, see **BANKS AND BANKING**, 6.

**FORMER ADJUDICATION:**

See **JUDGMENT**, 4-6.

**FRANCHISE:**

Review of action of municipality granting franchise, see **CERTIORARI**, 2.

Railway franchise as property subject to assessment, see **MUNICIPAL CORPORATIONS**, 2.

Remedy against void act in granting franchise, see **MUNICIPAL CORPORATIONS**, 1.

**FRAUD:**

As affecting discharge in bankruptcy, see **BANKRUPTCY**, 2.

Defense in action on written guarantee of note, pleading immaterial issues, see **BILLS AND NOTES**, 1.

As ground for cancellation of instruments, see **CANCELLATION OF INSTRUMENTS**.

Evidence to show fraud in inducing contract, see **CONTRACTS**, 1.

In sale on execution, sufficiency of evidence, see **EXECUTION**, 1.

In issuance of patent to Indian, see **INDIANS**, 3.

As affecting discharge in bankruptcy, judgment as bar, see **JUDGMENT**, 5.

In sale of personalty, see **SALES**, 1, 2.

**FRAUDS, STATUTE OF:**

Validity of oral authority to execute contract of sale, see **BROKERS**, 1, 2.

Memoranda as authority to execute contract of sale, see **BROKERS**, 1, 2.

Oral agreement affecting separate character of property subsequently acquired, see **HUSBAND AND WIFE**, 3.

## FRAUDS, STATUTE OF—CONTINUED.

1. FRAUDS, STATUTE OF—CONTRACT TO SELL LAND—ORAL AUTHORITY—EVIDENCE. Proof of oral authority to a real estate broker to make a binding contract of sale, within the requirements of the statute of frauds, is sufficiently clear and convincing, within the rule which requires such degree of proof, when liberally construed on motion for a nonsuit, where the broker testified that the owner had listed the property with him, and on departing for a short absence, instructed him "to sell quick, take the money and close the deal" before the owner's return, if he could do so. *Degginger v. Martin*... 1
2. FRAUDS, STATUTE OF—CONTRACT—SIGNING. A broker's contract for the sale of lands is sufficiently signed where the firm name under which the broker did business was typewritten, and he signed his initials below. *Degginger v. Martin*..... 1
3. FRAUDS, STATUTE OF—BROKERS—EMPLOYMENT—ORAL CONTRACT—SUFFICIENCY. Under Laws 1905, p. 110, requiring a contract with a broker for commissions on the sale of real estate, or a memorandum thereof, to be in writing, an oral contract of employment for the sale of land at a stated compensation is void as within the statute of frauds. *Briggs v. Bounds*..... 579
4. SAME—PERFORMANCE—EFFECT. Where a statute requires a contract for the employment of a broker, or a memorandum thereof, to be in writing, full performance of an oral contract will not take the same out of the operation of the statute or authorize a recovery upon a *quantum meruit*. *Briggs v. Bounds*..... 579
5. FRAUDS, STATUTE OF—BROKERS—EMPLOYMENT—CONTRACT IN WRITING—MEMORANDUM—SUFFICIENCY. Under Laws 1905, p. 110, requiring a contract with a broker for commissions on the sale of real estate, or a memorandum thereof, to be in writing, a note of instructions to the agent containing none of the terms of the contract of employment is insufficient as a memorandum under the statute. *Ross v. Kaufman*..... 678

## FRAUDULENT CONVEYANCES:

1. FRAUDULENT CONVEYANCES—TRANSFER OF PERSONALTY — PLACE OF SALE—WHAT LAW GOVERNS. The statutes of Idaho relating to sales have no bearing on the question of the ownership of personal property sold in this state and afterwards removed to Idaho. *Greenwood v. Corbin*..... 357
2. SAME—CHANGE OF POSSESSION—EXISTING CREDITORS—STATUTES—CONSTRUCTION. Bal. Code, § 4578, providing that no bill of sale for the transfer of personal property shall be valid as to existing creditors, where the property remains in the possession of the vendor, unless the same is recorded, has no application where no debts existed at the time of the sale. *Greenwood v. Corbin*..... 357

## FREIGHT:

Limitation of carrier's liability for loss of goods, see CARRIERS, 1.

**FRESHETS:**

Enjoining artificial freshets created by driving company, see **WATERS AND WATER COURSES**, 7.

**GARNISHMENT:**

Garnishee as adverse party on appeal, see **APPEAL AND ERROR**, 9.

1. **GARNISHMENT—JUDGMENT AGAINST GARNISHEE—PAYMENT INTO COURT—WHO ENTITLED TO.** Under Bal. Code, § 5403, upon judgment against a garnishee, and payment of the same to the clerk of the court, the judgment and payment inures to the benefit of the successful party in the principal action, and the plaintiff is not entitled to the fund in court until after recovery of judgment against the defendant. *State ex rel. Tatum v. Fitzhenry*..... 130

**GRANT:**

Of public lands in aid of railroad, see **PUBLIC LANDS**, 2.

**GUARANTEE:**

Pleading in action on written guarantee of note, see **BILLS AND NOTES**, 1.

**GUARDIAN AND WARD:**

Guardianship of insane persons, see **INSANE PERSONS**.

**HARMLESS ERROR:**

In civil actions, see **APPEAL AND ERROR**, 25-31.

In trial of civil actions, see **TRIAL**, 3.

Instructions for conversion of logs, see **TROVER AND CONVERSION**, 3.

**HEALTH:**

Health laws as within police power, see **CONSTITUTIONAL LAW**, 1.

**HEIRS:**

See **DESCENT AND DISTRIBUTION**.

**HIGHWAYS:**

Appropriation of land abutting on highways, see **EMINENT DOMAIN**, 16.

**HOLIDAYS:**

Proceedings on holidays as invalidating judgment, see **JUDGMENT**, 1.

**HOMESTEAD:**

Vacation of order setting aside homestead for use of widow and children, see **JUDGMENT**, 2.

1. **HOMESTEAD—DECLARATION—NECESSITY.** Under Laws 1895, p. 109, there is no homestead right in property acquired since the passage of the act unless a declaration of homestead is executed and filed as therein required. *Donaldson v. Winningham*..... 374

## HOMESTEAD—CONTINUED.

2. **HOMESTEAD—ABANDONMENT.** Where debtors removed from their real estate upon which they had lived, and went to another state, secretly selling their personal property or removing the same, with intent to establish their residence in such other state and to defraud their creditors, they cannot, after attachment, return to the premises and claim a homestead exemption thereon by living on the premises for a month, no effort to set aside the attachment being made prior to sale on execution, and the return to the premises not being made in good faith; Bal. Code, § 5254, providing that the exemption shall not apply to such persons. *Gullickson v. Fenlon*..... 503

**HOMICIDE:**

See **CRIMINAL LAW.**

Examination of juror for bias or prejudice, see **JURY.**

1. **HOMICIDE—JUSTIFICATION—DEFENSE OF PROPERTY.** In a prosecution for a homicide committed by rigging a spring gun in a trunk, it is error to assume that the law prohibited the setting of a spring gun except when necessary to prevent a capital crime; since homicide for the prevention of any forcible and atrocious crime is justifiable. *State v. Marfaudille*..... 117
2. **SAME—MURDER IN SECOND DEGREE—INTENT AND MALICE—QUESTION FOR JURY.** In a prosecution for a homicide by the rigging of a spring gun in a trunk, it is error to sanction the prosecuting attorney's statement that the defendant would be guilty of murder in the second degree, if death resulted from his act in setting a spring gun, and that the same would be a question of law for the court; since the elements of both malice and intent must be determined by the jury. *State v. Marfaudille*..... 117
3. **SAME—EVIDENCE—WARNING OF SPRING GUN—ADMISSIBILITY.** In a prosecution for homicide by the rigging of a spring gun in a trunk, evidence that the defendant warned the deceased of the gun, while not a defense unless deceased deliberately attempted suicide, might be material on the question of malice. *State v. Marfaudille*.... 117
4. **HOMICIDE—INTENT—EVIDENCE—OFFER OF PROOF.** Upon a prosecution for a homicide by the rigging of a spring gun, defendant's offer to prove that he did not intend to kill the deceased is inadmissible, since any intent was necessarily general and would not be disproved by intent as to any particular person. *State v. Marfaudille* ..... 117
5. **HOMICIDE—MANSLAUGHTER—INFORMATION—SUFFICIENCY.** An information charging a physician with manslaughter in counseling and directing the withholding of food, save water and the juices of fruit, "and such other nourishment as he, the said C. McF. might direct," is insufficient in simply alleging that his directions were followed and the food given was insufficient to sustain life, since that

**HOMICIDE—CONTINUED.**

is in the nature of a conclusion; and it is necessary to set forth a specific statement of all his directions, showing the kind and quantity of nourishment directed to be given and that starvation was the necessary result. *State v. McFadden*..... 259

**HUSBAND AND WIFE:**

Adultery, see ADULTERY.

Adverse possession of community property, see ADVERSE POSSESSION, 6.

Divorce and judicial separation, see DIVORCE.

Effect of delay in bringing action for partition by wife as tenant in common, see EQUITY.

Evidence to show marriage, see MARRIAGE.

Competency as witnesses, see WITNESSES, 6, 7.

1. HUSBAND AND WIFE—COMMUNITY PROPERTY—PUBLIC LANDS—HOMESTEAD MORTGAGE. A homestead settled upon and improved by a man before marriage, to whom patent is issued therefor after final proof, is his separate property; and his wife need not join in a mortgage thereof. *Rogers v. Minneapolis Threshing Machine Co.* 19
2. HUSBAND AND WIFE—COMMUNITY OR SEPARATE PROPERTY. Where separate property of a husband is conveyed in exchange for other property, the latter is not community property. *Holly Street Land Co. v. Beyer*..... 422
3. HUSBAND AND WIFE—COMMUNITY PROPERTY—ORAL AGREEMENT—FRAUDS, STATUTE OF. An oral agreement between husband and wife that real property thereafter acquired by either should be the separate property of such party, is void and does not change its community character, in view of Bal. Code, § 4490, making the same community property, and Bal. Code, § 4517, providing that conveyances of any interest in real estate shall be by deed. *Graves v. Graves*. 664
4. SAME—EVIDENCE OF AGREEMENT—SUFFICIENCY. The evidence is insufficient to show an agreement that lots acquired by the husband were to be held as his separate property, where the wife flatly contradicts his testimony to that effect. *Graves v. Graves*..... 664

**IDEM SONANS:**

See EXECUTION, 3.

**IMPEACHMENT:**

Of witness, see WITNESSES, 11, 12.

**IMPROVEMENTS:**

Liens, see MECHANICS' LIENS, 1, 2.

Public improvements, see MUNICIPAL CORPORATIONS.

**INCUMBRANCES:**

See CHATTEL MORTGAGES.

**INDEBTEDNESS:**

Of fraudulent grantors, see FRAUDULENT CONVEYANCES.

Limitation of indebtedness, see MUNICIPAL CORPORATIONS, 11, 12.

Of testator, see WILLS.

**INDEMNITY:**

See INSURANCE, 4.

**INDEPENDENT CONTRACTORS:**

See MASTER AND SERVANT, 2, 29.

**INDIANS:**

1. INDIANS—LANDS—ALLOTMENT—PATENT—PRESUMPTION. Where the law provides that an Indian allotment may be assigned, upon a patent to one Indian of land allotted to another, it will be presumed that the allotment was duly assigned. *Meeker v. Winyer*..... 27
2. SAME—TRIBAL RELATIONS—EVIDENCE. The fact that an Indian had belonged to another tribe, does not disprove that his relations therewith had been severed and that he had become a member of another tribe and entitled to hold land as such. *Meeker v. Winyer* 27
3. SAME—PATENT IN TRUST—FRAUD—EVIDENCE. A patent to an Indian, the son-in-law of the original allottee, will not be set aside as a fraud upon, or held to be in trust for, the original allottee, where it appears that she knew of the issuance of the patent to her son-in-law, had lived on the land with her family without making any claim thereto, and no claim was made by her heirs having knowledge of the patent until nearly twenty years after its issuance, more than a decade after the death of the patentee, and several years after the death of the original allottee. *Meeker v. Winyer*..... 27

**INDICTMENT AND INFORMATION:**

See HOMICIDE, 5.

Violation of statute as to dealings with "the corporation and its stock," see CORPORATIONS, 1.

1. INDICTMENT AND INFORMATION—TIME FOR FILING—DISMISSAL FOR DELAY—TIME FOR MOTION. Under the statute requiring the dismissal of a criminal prosecution if an indictment is not found or information filed within thirty days after the holding of the person, the motion for dismissal must be made at the time the accused is called to plead; since such dismissal is not a bar to another prosecution, and the objection is waived by pleading and going to trial. *State v. Seright* ..... 307

**INFANTS:**

Custody and support on divorce of parents, see DIVORCE, 2-4.

Infancy as interrupting limitation, see LIMITATION OF ACTIONS.

Warning and instructing minor employees, see MASTER AND SERVANT, 15, 18.

48—48 WASH.

**INFORMATION:**

Criminal accusation, see **INDICTMENT AND INFORMATION**.

**INHERITANCE:**

See **DESCENT AND DISTRIBUTION**.

**INJUNCTION:**

Suspension of injunction upon filing of bond, see **APPEAL AND ERROR**, 13.

Against issuance of bonds, defenses, see **MUNICIPAL CORPORATIONS**, 9.

Action on bond, instructions as to damages, see **TRIAL**, 8.

To require delivery of water from irrigation ditch, see **WATERS AND WATER COURSES**, 8.

Interference with natural flow of stream, see **WATERS AND WATER COURSES**, 7.

1. **INJUNCTION—ACTIONS FOR—AGAINST ABATEMENT OF NUISANCE—EVIDENCE—SUFFICIENCY.** It is error to grant an injunction against the abatement by a landlord of a nuisance on leased premises, where it appears that the tenant was maintaining a nuisance by the operation of heavy, noisy machinery in a storeroom of a hotel which jarred the building and disturbed the guests of the hotel in a manner not contemplated by the lessor, the lease giving no such right, and the burden of proof being on the plaintiff to show authority for such operation. *Spokane Stamp Works v. Ridpath*..... 370
2. **INJUNCTION—ORDER FOR—CONSTRUCTION.** Upon a hearing after the issuance of a temporary injunction, an order that the injunction be continued *pendente lite*, and that "an injunction forthwith issue," as prayed for, does not require that another injunction be formally issued, as the order was intended to operate as an injunction upon the filing of the required bond, and to make the temporary order effective thereafter. *Collins v. Huffman*..... 184
3. **SAME.** In an action upon injunction bonds to recover damages by reason of being deprived of the control of a business, it is not error to instruct that the jury may award damages by reason of a temporary injunction which was in force for six days, where under the evidence it was for the jury to say whether any actual damages accrued. *Collins v. Huffman*..... 184
4. **SAME—ATTORNEYS FEES AS DAMAGES.** In an action upon an injunction bond, damages for attorney's fees paid are not recoverable where there is no evidence that any attorney's fees were incurred or paid by reason of the injunction separate and distinct from the other issues involved in the case. *Collins v. Huffman*..... 184
5. **SAME—ACTIONS—DAMAGES—EVIDENCE—ADMISSIBILITY.** In an action upon injunction bonds to recover damages by reason of being deprived of the control of a business, evidence as to the collectibility of a certain account is inadmissible where it appears that the ac-

**INJUNCTION—CONTINUED.**

count was not taken in charge by the defendants, under the injunction, or its collection taken from the plaintiffs. *Collins v. Huffman* ..... 184

6. SAME. In an action upon injunction bonds to recover damages by reason of the dissipation of a stock of goods, evidence of what the remnant of the stock sold for after dissolution of the injunction is immaterial, where the defendants were charged with the invoice price of the stock; since the invoice price of the remnant, which was turned over to a jobbing association, should be credited to the defendants. *Collins v. Huffman*..... 184

**INSANE PERSONS:**

Insanity as defense to criminal prosecution in general, see **CRIMINAL LAW**, 3-6.

1. **INSANE PERSONS—APPOINTMENT OF GUARDIAN—NECESSITY OF ADJUDICATION OF INSANITY.** In the absence of fraud or conspiracy, the superior court has jurisdiction to appoint a guardian for an insane person irrespective of a prior adjudication of insanity, which is accordingly irrelevant on the question of the validity of the guardianship proceedings. *Donaldson v. Winningham*..... 374
2. **INSANE PERSONS—APPOINTMENT OF GUARDIAN—NECESSITY OF NOTICE—SALE OF PROPERTY.** Service of notice of the application for the appointment of a guardian of an insane person, upon the person having the care and custody of the insane person, is a jurisdictional prerequisite to an order of sale of such insane person's real property. *Donaldson v. Winningham*..... 374

**INSPECTION:**

By master of appliances used by servant as affecting liability for injuries, see **MASTER AND SERVANT**, 7.

**INSOLVENCY:**

See **BANKRUPTCY**.

Of corporation, see **CORPORATIONS**, 4-7.

**INSTRUCTIONS:**

As part of record on appeal, see **APPEAL AND ERROR**, 16.

Review as dependent on prejudicial nature of error, see **APPEAL AND ERROR**, 25, 26.

In civil actions, see **TRIAL**, 4, 5, 7, 8.

**INSURANCE:**

Of mortgaged property, see **CHATTEL MORTGAGES**, 6.

## INSURANCE—CONTINUED.

1. **INSURANCE—INSURABLE INTEREST—PROPERTY UNDER CONTRACT OF SALE—ESCROWS—PROOF OF SPECIAL INTEREST.** Where, pending a purchase of personal property, the conveyance was placed in escrow, and the condition for delivery was not complied with at the time of a loss by fire, the general property remains in the vendor, and the vendee, although in possession, cannot recover on a policy of fire insurance taken out by him, in the absence of proof of the value of his special interest in the property; personal property not being within the provisions of the valued policy law. *Bright v. Hanover Fire Insurance Co.*..... 60
2. **SAME—VALUED POLICY LAW.** The valued policy law (Laws 1899, p. 332), applies to a policy of fire insurance taken out by a vendee having a special interest in hotel property (real estate), by reason of a conveyance in escrow, the conditions for delivery of which were not performed at the time of the loss; and thereunder the amount of insurance written in the policy is conclusively taken as the true value of the insured's special interest. *Bright v. Hanover Fire Insurance Co.* ..... 60
3. **INSURANCE—PROOFS OF LOSS—NECESSITY.** It is a condition precedent to an action on a fire insurance policy that proofs of loss be furnished within the time required by the policy, where the insured was not misled in any way; and a statement by an agent that he was not in a position to arbitrate, and neither admitted nor denied anything, cannot be said to mislead the insured. *Davis v. Northwestern Mutual Fire Association.*..... 50
4. **INSURANCE—INDEMNITY—POLICY—NOTICE OF INJURY—RELEASE OF INSURER—TRUTH OF FACTS STATED.** In an action upon an indemnity policy against liability for personal injuries to a servant, which required the insured to give full particulars of any claim, the company is not released by the fact that notice of claim upon a form furnished by the company (allowing only short spaces for answers to printed questions) stated briefly that the servant was injured by his own negligence in putting up scaffolding, when the fact was that defendant's carpenters erected the same, where the statements were made in good faith; since a more full statement and warranties of the answers were not intended. *Moran Brothers Co. v. Pacific Coast Casualty Co.* ..... 592

## INTENT:

- As affecting delivery of deed, see DEEDS, 2.
- Admissibility of evidence to show intent to kill, see HOMICIDE, 4.
- As question for jury, see HOMICIDE, 2.
- Admissibility of evidence to show intent, see RAPE, 1.

## INTEREST:

- Admissibility of evidence to show interest and credibility of witness, see WITNESSES, 9.

**INTERPLEADER:**

Review of action, see **APPEAL AND ERROR**, 1.

**INTERROGATORIES:**

In proceeding for discovery, see **DISCOVERY**.

**INTERVENTION:**

In action to quiet title, see **PARTIES**, 1.

**INVESTIGATION:**

Duty of buyer to investigate, see **SALES**, 1.

**IRRIGATION:**

See **WATERS AND WATER COURSES**, 3, 6.

**ISSUES:**

Facts in issue and relevant to issues, see **EVIDENCE**, 1.

Facts in issue under pleadings, see **PLEADING**.

**JOINDER:**

Of parties on appeal, see **APPEAL AND ERROR**, 10.

Of wife in mortgage of separate property, see **HUSBAND AND WIFE**, 1.

Of legal and equitable causes of action, see **QUIETING TITLE**.

Of parties defendant, see **QUIETING TITLE**, 2.

By wife in conveyance of trust property, see **TRUSTS**, 2.

**JOINT TRIAL:**

Of codefendant, see **CRIMINAL LAW**, 7.

**JOINT TORT FEASORS:**

See **NEGLIGENCE**, 5.

**JUDGES:**

See **JUSTICES OF THE PEACE**.

**JUDGMENT:**

Description in notice of appeal from entire judgment, see **APPEAL AND ERROR**, 12.

Former decision as law of the case on subsequent appeal, see **APPEAL AND ERROR**, 43.

In attachment proceedings, see **ATTACHMENT**, 1.

Presumptions upon collateral attack on judgment against bankrupt, see **BANKRUPTCY**, 1.

As lien on property subsequently acquired by bankrupt, see **BANKRUPTCY**, 2.

Decree for alimony, see **DIVORCE**, 5, 6.

Conclusiveness of order settling administrator's final account, see **EXECUTORS AND ADMINISTRATORS**, 9.

Foreclosure judgment to establish title of plaintiff, see **FORCIBLE ENTRY AND DETAINER**.

## JUDGMENT—CONTINUED.

In garnishment proceedings, see GARNISHMENT.

Right to hold office as question considered on motion for new trial in action for wrongful execution of judgment, see JUSTICES OF THE PEACE.

1. JUDGMENT—PREVENTING ENFORCEMENT — COMPLAINT— SUFFICIENCY —ENTRY—PRESUMPTIONS—HOLIDAYS. Proceedings under a judgment will not be restrained on the ground that the judgment was entered on a holiday, where it merely appears from the complaint that on a holiday the judge heard the arguments, announced his decision, and directed a judgment to be entered; since it will be presumed that the judgment was properly entered at a subsequent date. *Stewart v. State Board of Medical Examiners*..... 655
2. JUDGMENT—VACATION — HOMESTEAD — ORDER SETTING APART — REVIEW. An order setting aside a homestead for the use of a widow and children is a final order which can be set aside only by motion for a new trial or petition on statutory grounds, under Bal. Code, §§ 4953 and 5153, and cannot be vacated on petition of the widow on the mere allegation that the property was community property and that she was entitled to the exclusive possession of the same. *In re McKeever's Estate*..... 429
3. JUDGMENT—COLLATERAL ATTACK. In an action to quiet title acquired at a judicial sale, a cross-complaint by the former owner attacking the validity of the order or judgment of sale, is a direct and not a collateral attack on the order or judgment, in which the jurisdiction of the court to make the order may be inquired into. *Donaldson v. Winningham* ..... 374
4. JUDGMENT—RES JUDICATA—COURTS. A judgment of the superior court in a probate proceeding is conclusive upon the parties thereto, where the same matters are subsequently sought to be raised in a civil action. *Meeker v. Winyer*..... 27
5. JUDGMENT—CONCLUSIVENESS—RECITALS— EVIDENCE TO CONTRADICT —BANKRUPTCY — DISCHARGE — FRAUD IN OBTAINING PROPERTY. In bankruptcy proceedings, judgments reciting that recovery was had against the bankrupt because of fraud in obtaining property are conclusive on that question, in a subsequent action by the bankrupt to restrain execution sales by judgment creditors who claimed that the discharge in bankruptcy did not affect judgments taken because of fraud in obtaining property, within § 17 of the Bankruptcy Act; and evidence to controvert the fact recited is inadmissible. *Nichols v. Doak* ..... 457
6. JUDGMENT—RES JUDICATA—DISMISSAL OF ACTION. The dismissal of an action "without prejudice" is not *res judicata* in a subsequent suit between the same parties for the same cause. *Budlong v. Budlong* ..... 645

**JUDICIAL SALES:**

- Of property of decedent, see **EXECUTORS AND ADMINISTRATORS**, 7, 8.
- Collateral attack on judgment or order of sale, see **JUDGMENT**, 3.

**JURISDICTION:**

- Appellate jurisdiction, see **APPEAL AND ERROR**.
- Of supreme court to issue order of supersedeas, see **APPEAL AND ERROR**, 13.
- Disbarment proceedings, see **ATTORNEY AND CLIENT**, 1.
- On defective proof of service of notice, see **EMINENT DOMAIN**, 21, 22.
- Sale of real estate of insane person, see **INSANE PERSONS**.
- Appointment of guardian for lunatic, see **INSANE PERSONS**.

**JURY:**

- Instructions in civil actions, see **TRIAL**, 4, 5, 7, 8.
- Questions for jury in civil actions, see **TRIAL**, 4.
- 1. **JURY—EXAMINATION—BIAS.** Upon a prosecution for a homicide, committed by rigging a spring gun in a trunk, the defendant is entitled to ask veniremen, upon their *votr dire*, whether the fact of a death from such acts would create any prejudice or bias against the defendant, and it is prejudicial error to sustain objections thereto. *State v. Marfaudille*..... 117

**JUSTICES OF THE PEACE:**

- 1. **JUSTICE OF THE PEACE—RIGHT TO OFFICE—NEW TRIAL—QUESTIONS CONSIDERED.** The right of a justice of the peace who rendered a judgment to hold his office cannot be questioned by a motion for a new trial, and an attempted accompanying *quo warranto* proceeding, in an action for damages and wrongful execution of the justice's judgment. *Eaid v. Connolly*..... 584

**JUSTIFICATION:**

- Of homicide, see **HOMICIDE**, 1.

**KNOWLEDGE:**

- Master's knowledge of defects in tools and appliances or dangers incident to employment, see **MASTER AND SERVANT**, 8.
- Servant's knowledge of defect or danger as element of assumption of risk by servant, see **MASTER AND SERVANT**, 18, 24.

**LACHES:**

- Effect on equity, see **EQUITY**.

**LANDLORD AND TENANT:**

- Liability of leasehold estate for laborer's lien, see **AGRICULTURE**, 2.
- Injunction against abatement of nuisance on leased premises, see **INJUNCTION**, 1.
- Mechanics' lien for improvements by tenant, see **MECHANICS' LIENS**, 1, 2.

## LANDLORD AND TENANT—CONTINUED.

1. LANDLORD AND TENANT—EXISTENCE OF RELATION. Permission to continue an occupancy of land already held, is not sufficient to show a tenancy, where the land was held eighteen years without the payment of rent. *Bryant Lumber & Shingle Mill Co. v. Pacific Iron & Steel Works* ..... 574
2. LANDLORD AND TENANT—NUISANCE—UNLAWFUL USE BY TENANT—EVIDENCE—SUFFICIENCY. The evidence is sufficient to show that the operation of a stamp mill in a leased storeroom, on the ground floor of a hotel building, is a nuisance which the landlord has a right to have abated by termination of the lease, and it is error to grant a nonsuit in his action of forcible entry and detainer, where it appeared that the operation of the machinery severely shook and jarred the building to such an extent as to greatly annoy the guests everywhere in the hotel, and prevent the leasing of certain rooms. *Ridpath v. Spokane Stamp Works*..... 320
3. LANDLORD AND TENANT—RECOVERY OF POSSESSION—ACTIONS—PLEADING—ANSWER OF PAYMENT. In an action of unlawful detainer against a tenant, an answer is not demurrable as pleading a counterclaim, but in effect pleads payment of rent, where it alleges an agreement on the part of the landlord to make certain repairs, a failure on his part to do so, the making of the repairs and paying therefor by the defendants, and payment of the balance of the rent after deducting the cost of the repairs, and that the checks given in payment of rent were retained by the plaintiff for two months and until after commencement of the action. *Tipton v. Roberts*..... 391
4. SAME—EVIDENCE OF PAYMENT—SUFFICIENCY. In an action of unlawful detainer against a tenant for nonpayment of rent, a finding of full payment is supported by evidence that all rents due were paid, less the amount paid for repairs which the landlord had agreed to pay, and that a receipted bill for the repairs was given to and retained by the landlord's agent. *Tipton v. Roberts*..... 391

## LANDS:

See PUBLIC LANDS.

Deeds and conveyances in general, see DEEDS.

Indian lands, see INDIANS.

## LAW OF THE CASE:

Decision on appeal, see APPEAL AND ERROR, 43.

## LEASES:

See LANDLORD AND TENANT.

## LEGISLATIVE CONSTRUCTION:

See STATUTES, 6.

**LETTERS:**

Admissibility to show authorized establishment of branch bank,  
see **BANKS AND BANKING**, 3.

**LIBEL AND SLANDER:**

1. **LIBEL AND SLANDER—COMPLAINT.** A complaint for libel setting out the publication of the fact that plaintiff secured a marriage license, attempted to suppress the fact, and could not find the bride, is demurrable for want of sufficient facts, where it contains no inducement or innuendo and it is not alleged that any of the statements published are false; the statements not being libelous *per se*. *Whitehouse v. Cowles*..... 546
2. **SAME—CONDITIONS PRECEDENT—NOTICE TO PUBLISHER—EVIDENCE—SUFFICIENCY.** Under Laws 1899, p. 101, requiring, as a condition precedent to an action for newspaper libel, the service of notice upon the publisher for a retraction of the publication, an action for libel is properly dismissed, where the only proof that the person served with notice was publisher of the paper at the time of publication consisted of a contract purporting to be signed by him as publisher, by one Y, his business manager, some months prior to the publication, and of two checks signed by him describing him as publisher of the paper, dated six to eight months after the publication of the libel. *Whitehouse v. Cowles*..... 546

**LICENSES:**

Constitutionality of law licensing barbers, see **CONSTITUTIONAL LAW**, 1, 2.  
For practice of dentistry, see **PHYSICIANS AND SURGEONS**, 3.  
Revocation of parol license to use of water for irrigation, see **WATERS AND WATER COURSES**, 8.

**LIENS:**

Agricultural liens, see **AGRICULTURE**.  
Attachment, see **ATTACHMENT**, 1.  
Judgment as lien on property subsequently acquired by bankrupt, see **BANKRUPTCY**, 2.  
Liens of mechanics and materialmen, see **MECHANICS' LIENS**.  
For money advanced in compromise of foreclosure suit, see **MONEY PAID**.

**LIMITATION:**

Of liability for lien, see **MECHANICS' LIENS**, 1.  
Of indebtedness and expenditures of municipality, see **MUNICIPAL CORPORATIONS**, 11, 12.

**LIMITATION OF ACTIONS:**

Laches, see **EQUITY**.  
Time for presentation of claims against decedent's estate, see **EXECUTORS AND ADMINISTRATORS**, 3, 4.

## LIMITATION OF ACTIONS—CONTINUED.

1. LIMITATION OF ACTIONS—DISABILITY—MINORITY. The ten-year statute of limitations for actions for the recovery of real property does not begin to run against a minor until he attains his majority. *McMillan v. Walker*..... 342

## LIMITATION OF LIABILITY:

Of carrier of goods in general, see CARRIERS, 1.

## LOGS AND LOGGING:

Condemnation by boom company, see EMINENT DOMAIN, 9-15.

Measure of damages for conversion of cut logs in general, see TROVER AND CONVERSION, 4.

Right to enjoin maintenance of dam creating artificial freshets, see WATERS AND WATER COURSES, 7.

1. LOGS AND LOGGING—BOOMS—DAMAGES — TRIAL — VERDICT. In an action for the conversion of logs cut into lumber by defendant, and for damages from obstructing a stream with a boom, whereby a portion of plaintiff's logs not cut up were lost to the plaintiff, it is immaterial whether the logs were wrongfully cut up or were lost by the wrongful acts of the defendant; hence a verdict for the plaintiff for the total damages by reason of logs lost and converted is not excessive, although the proof did not show what amount was cut up and converted. *Shields v. Doty Lumber & Shingle Co.*..... 679

## LUNATICS:

See INSANE PERSONS.

## MACHINERY:

Liability of employer for defects, see MASTER AND SERVANT, 5, 7, 9, 14.

## MALICE:

As question for jury, see HOMICIDE, 1.

## MANDAMUS:

To fix amount of supersedeas bond on appeal from award of alimony, see DIVORCE, 6.

To compel levy of assessment in drainage district, see DRAINS.

## MANSLAUGHTER:

See HOMICIDE, 5.

## MAPS:

Admissibility in evidence, see EVIDENCE, 4.

## MARRIAGE:

1. MARRIAGE—EVIDENCE—ADMISSIBILITY—REPUTE. Evidence of cohabitation, repute and holding each other out as husband and wife, is admissible as tending to show a prior ceremonial marriage, whether a common law marriage is valid or not. *Nelson v. Carlson* ..... 651

**MARRIAGE—CONTINUED.**

2. **SAME—SUFFICIENCY.** The evidence is sufficient to establish a marriage, where it appears that the parties cohabited and lived together as man and wife in several states, executed deeds as such, and the wife was buried and a monument erected by the husband describing her as his wife. *Nelson v. Carlson*..... 651

**MASTER AND SERVANT:**

Laborer's lien, see **AGRICULTURE**.

Evidence of fraud in inducing contract of employment, see **CONTRACTS**, 1.

Personal injuries, excessive damages, see **DAMAGES**, 1.

Employment of teacher, see **SCHOOLS AND SCHOOL DISTRICTS**, 2.

1. **MASTER AND SERVANT—RELATION—TERMINATION—NOTICE.** A contract for employment for an indefinite time may be terminated by either party by notice to the other; and where a bill for service was presented through an attorney, notice of termination may be given by the other party through the same source, and there can be no recovery for services rendered thereafter. *Kershner v. Henderson* ..... 228
2. **MASTER AND SERVANT—RELATION—INDEPENDENT CONTRACTOR.** The relation of an independent contractor is not created by a contract whereby one agrees to employ the help and operate a lath mill and to receive as compensation a certain sum per thousand lath, after the owner has paid the employees therefrom, the owner having retained control of that department of the mill and the mode of work, and control over the workmen employed. *Barclay v. Puget Sound Lumber Co.*..... 241
3. **MASTER AND SERVANT—DISCHARGE—NEGLIGENCE OF SERVANT.** The discharge of a superintendent of a dairy, employed for a four-year term, is justified upon the ground of negligence in the discharge of his duties, where it appears that, during the few months that he was employed, he left a wild colt attached to a wagon unhitched and unattended near a railway track, allowing the team to run away, on this and on a similar occasion no more favorable to him. *Wright v. Lake*..... 469
4. **MASTER AND SERVANT—EMPLOYMENT—ACTION FOR WAGES—EVIDENCE—ADMISSIBILITY.** Upon an issue as to whether plaintiff was employed by, and performed services for the defendant, monthly statements made by plaintiff to defendant of expenses in working a mine, showing services performed and a claim for salary due, are relevant to the issues and admissible in evidence, whether shown to the defendant's board of trustees or not. *Pearce v. Greek Boys' Mining Co.* ..... 38

## MASTER AND SERVANT—CONTINUED.

5. MASTER AND SERVANT—NEGLIGENCE OF MASTER—SAFE APPLIANCES—DEFECTIVE CARS—CUSTOMARY USE OF CAR. Where a railroad company is aware of an habitual custom of brakemen to use a cross-piece of a wood rack on a wood car for the purpose of boarding the car while it is being switched, it is the duty of the company to keep the same reasonably safe for such use, although not originally intended for that purpose. *Sturgeon v. Tacoma Eastern R. Co.*..... 366
6. SAME—CONTRIBUTORY NEGLIGENCE—CUSTOMARY METHODS—OPERATION OF TRAINS. A brakeman is not guilty of contributory negligence, as a matter of law, in attempting to board a wood car, while switching at the rate of one to four miles an hour, where there was evidence by trainmen of years of experience that it was customary on all railroads to board such cars in the identical manner employed by him. *Sturgeon v. Tacoma Eastern R. Co.*..... 366
7. SAME—DUTY TO INSPECT—RULES OF COMPANY. A railroad company cannot by rules impose upon a brakeman the duty of inspecting cars about to be switched, so as to escape liability for a defective cross-piece in a wood rack, whereby the brakeman was injured in attempting to board the car, on a dark morning, with but little opportunity to inspect cars while engaged in his other duties. *Sturgeon v. Tacoma Eastern R. Co.*..... 366
8. MASTER AND SERVANT—NEGLIGENCE—PROMISE TO REPAIR—MATERIALITY—ISSUES AND PROOF. In an action for damages by the operator of a rip saw, who was struck and knocked down by a belt, which broke on his use of the idler, a promise to repair the belt, made on the complaint that the belt was likely to start the machinery without the use of the idler and thereby cut the operator's hand, is immaterial and does not support plaintiff's cause of action. *Waight v. Lake Washington Mill Co.*..... 402
9. SAME—CAUSE OF ACCIDENT—ISSUES AND PROOF. Conceding that the operator of a rip saw was struck down by a belt which broke and caused the injury, a nonsuit is properly granted where the only allegations of negligence were that the machinery was out of plumb and the belt was too short, and there was no definite proof to sustain either of such allegations, or to show any cause for the breaking of the belt. *Waight v. Lake Washington Mill Co.*..... 402
10. MASTER AND SERVANT—NEGLIGENCE—CAUSE OF INJURY—EVIDENCE—SUFFICIENCY. In an action for the death of an operator of a shingle saw, a verdict for the plaintiff cannot be sustained, and should have been directed for the defendant, where it appears from the evidence that no one saw the accident, that the deceased had evidently fallen on the saw, where his body was found badly cut, and his fall upon the saw might have happened in a number of ways, and there was no substantial basis for the theory that the accident

MASTER AND SERVANT—CONTINUED.

was due to the negligence of the defendant; since the jury would have to guess as to the cause. *Olmstead v. Hastings Shingle Manufacturing Co.* ..... 657

11. MASTER AND SERVANT—NEGLIGENCE—CAUSE OF ACCIDENT—DEATH—EVIDENCE—SUFFICIENCY. The evidence is insufficient to establish the cause of the accident whereby the operator of a rip saw was killed, and a nonsuit is properly granted, where it appears that there was no witness to the accident, that the deceased had been struck in the abdomen by some blunt instrument, leaving a mark such as could have been made by a board which was found in close proximity to the deceased's position in operating the machine, which board had indentations indicating that it might have been caught and thrown by the saw by reason of failure to guard the saw with a splitter, and where it was only by inference that it could be said that the saw was being operated by the deceased at the time of the accident. *Peterson v. Union Iron Works*..... 505
12. SAME—EVIDENCE—ADMISSIBILITY—REMOTENESS. In an action for the death of an operator of a rip saw, where there was no direct evidence of the cause of the accident and at most only an inference that a board might have been caught and thrown by reason of lack of a guard or splitter, evidence of a defect in the saw table is inadmissible as too remote. *Peterson v. Union Iron Works*..... 505
13. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—OBEDIENCE TO COMMANDS—QUESTION FOR JURY. Where an employee was injured in the fall of a scaffold through the negligence of a foreman in ordering him to knock a brace loose from the scaffold, whether obedience to the command was so hazardous as to preclude a recovery was for the jury, and their verdict is conclusive. *Withiam v. Tenino Stone Quarries*..... 127
14. MASTER AND SERVANT—NEGLIGENCE—GUARDING DANGEROUS MACHINERY—QUESTIONS FOR JURY. The questions of negligence in failing to properly guard dangerous machinery, and whether it was the proximate cause of the accident, are for the jury where the evidence was conflicting and the plaintiff showed that an originally proper guard on a planer was out of repair, and so worn that upon being struck instead of remaining firm it would move against the knives, and carried plaintiff's hand against the same. *Tergeson v. Robinson Manufacturing Co.* ..... 294
15. SAME—CONTRIBUTORY NEGLIGENCE—OPERATION OF MACHINERY—YOUTHFUL EMPLOYEE. A minor, of limited experience in running a planer, cannot be said to be guilty of contributory negligence, as a matter of law, in attempting to remove a broken piece of lattice from a planer without stopping the machine, where there was evidence that he did not realize the danger, that such realization could

## MASTER AND SERVANT—CONTINUED.

come only from experience, and that he had not been instructed as to the same, when it was the master's duty to give such instructions.

*Tergeson v. Robinson Manufacturing Co.*..... 294

16. MASTER AND SERVANT—NEGLIGENCE OF MASTER—PROXIMATE CAUSE—SAFE PLACE—FELLOW SERVANTS. In an action by an employee, injured on a log deck in a saw mill, the evidence tends to show that the injury was caused, to some extent, by reason of failure to furnish a safe place to work, rather than by negligence of a fellow servant, where it appears that a steam kicker had torn a hole in the floor, into which the plaintiff stepped and was thrown down, causing him great pain at that time, and that in attempting to release him, the operator put the kicker in motion, after which it was discovered that his leg was broken. *Olson v. Humbird Lumber Co.* ..... 136
17. SAME—PLEADING—AMENDMENTS TO CONFORM TO PROOF—APPEAL—REVIEW—DISCRETION. In an action by an employee whose complaint relied particularly upon the negligence of a co-employee in putting in motion a steam kicker, after plaintiff's foot had become fast in a hole in the floor, it is discretionary to allow, upon terms, an amendment to the complaint to allege negligence in failing to provide a safe place to work, where the evidence made out a *prima facie* case of negligence as to the hole in the floor; and the same will not be reversed on appeal in the absence of a showing of abuse of discretion. *Olson v. Humbird Lumber Co.*..... 136
18. MASTER AND SERVANT—NEGLIGENCE—YOUTHFUL EMPLOYEE—DUTY TO INSTRUCT OR WARN—OBVIOUS DANGERS—EVIDENCE—SUFFICIENCY. In an action by a young and inexperienced employee, set to work upon a cut-off saw in a shingle mill, without instructions or warning, a verdict for the plaintiff will not be disturbed on appeal on the theory that the dangers were obvious, where it appears that some instruction is requisite to qualify one to operate a cut-off saw, and that there are dangers from involuntary contact that instructions and experience would warn against. *Wikstrom v. Preston Mill Co.* ..... 164
19. SAME—TRIAL—INSTRUCTIONS. An instruction upon the duty of a master need not also cover contributory negligence and assumption of risks where those subjects were fully covered in other instructions. *Wikstrom v. Preston Mill Co.*..... 164
20. SAME—NEGLIGENCE—ACTIONS FOR INJURIES—GUARDING MACHINERY—QUESTION FOR JURY. The question as to whether machinery can be advantageously guarded under the factory act is for the jury where that was the principal issue in the case and the testimony is conflicting. *Barclay v. Puget Sound Lumber Co.*..... 241

MASTER AND SERVANT—CONTINUED.

21. SAME—EVIDENCE—ADMISSIBILITY. Upon an issue as to whether machinery can be advantageously guarded, evidence that a certain contrivance could have been attached as a guard is not objectionable because the same was not in general use or commonly known, the question whether reasonable care was exercised in providing a guard being for the jury in such a case. *Barclay v. Puget Sound Lumber Co.* ..... 241
22. SAME. In an action for personal injuries received on a trimmer saw through the alleged failure to provide a guard, evidence as to the necessary size of the saw is immaterial, there being no issue on that question. *Barclay v. Puget Sound Lumber Co.*..... 241
23. SAME—TRIAL—INSTRUCTIONS. An instruction upon the necessity of guarding machinery under the factory act, stating the law too broadly when considered alone, is not ground for reversal, where, considered in the connection in which it was used, it was limited by other instructions in a way that could not have misled the jury. *Barclay v. Puget Sound Lumber Co.*..... 241
24. MASTER AND SERVANT—ASSUMPTION OF RISKS—OBVIOUS DANGERS. A pit or hole three feet square and ten feet deep, in a shop near a drill press then being constructed, and which was uncovered except by a plank three inches by twelve and four feet long, is such an obvious danger that notice must have been taken thereof by a helper, who fell into the hole while assisting to put in place a heavy wheel weighing fifty or sixty pounds, where it appears that the place was light, that he had just previously assisted in carrying and laying down a shaft within a few feet of the hole, that in carrying the wheel to the hole he had stepped on the plank over the same, and in some unexplained manner had lost his footing and fell into the hole. *Ford v. Heffernan Engine Works*..... 315
25. MASTER AND SERVANT—ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY. Whether risks were assumed as incident to the employment, and whether plaintiff was guilty of contributory negligence, are questions for the jury, where it appears that a fireman, while about to put wood on the fire, stepped back into a five-inch depression in the floor, causing his foot to come in contact with a pinch wheel, where it appears that the place was some what dark, that the wheel was protected by a much worn coaming which was insufficient to prevent contact with the wheel, and that plaintiff had been in the place but a few times and had not been warned, although he could have seen the wheel, the evidence as to the defenses being somewhat contradictory. *Hoff v. Japanese-American Fertilizer & Fisheries Co.*..... 581
26. MASTER AND SERVANT—NEGLIGENCE—ASSUMPTION OF RISKS—NEG-  
LIGENT ACT OF FOREMAN—EVIDENCE—SUFFICIENCY. An employee does not assume the risk as one incident to the work of constructing a

## MASTER AND SERVANT—CONTINUED.

- trestle, where it appears that the foreman negligently directed the attachment of a line to a timber in such a position that, upon tightening the line by his orders, planking at the top of a bent of piles was pushed loose and precipitated upon the employee below, who was not aware of the position of the line or given sufficient warning to enable him to reach a place of safety. *Cook v. Chehalis River Lumber Co.*..... 619
27. SAME—CONTRIBUTORY NEGLIGENCE. In such a case the employee is not guilty of contributory negligence in not anticipating the fall of the planking, where the operation was not the ordinary one of raising the timber, but merely to lift it sufficiently to enable the employee to saw it, and the ordinary dangers were increased by the act of the foreman. *Cook v. Chehalis River Lumber Co.*..... 619
28. SAME—FELLOW SERVANTS—FOREMAN OF CONSTRUCTION WORK. In such a case, the foreman having direction of the work of constructing the trestle is not a fellow servant of an employee engaged in sawing off the timber, but is a vice principal. *Cook v. Chehalis River Lumber Co.* ..... 619
29. MASTER AND SERVANT—RELATION—INDEPENDENT CONTRACTOR—EVIDENCE—SUFFICIENCY. The evidence sufficiently supports a finding that a person was not an individual contractor, and the master is liable for his negligence in blasting for an excavation, where evidence as to his contract was incomplete, the contract providing that the master should furnish all the powder, tools, and helpers for doing the blasting, without any restrictions as to the amount or cost thereof, and lacked such essential matters as to tend to impeach its good faith. *Johnson v. Great Northern R. Co.*..... 325

## MEASURE OF DAMAGES:

For failure of vendor to convey, see VENDOR AND PURCHASER, 8.

## MECHANICS' LIENS:

- Allowance of attorney's fees on foreclosure as involving discretion of court, see APPEAL AND ERROR, 39.
1. MECHANICS' LIENS—LEASED PREMISES—PARTIES LIABLE—LIMITATION OF LIABILITY—NOTICE—SUFFICIENCY. Where permanent repairs upon leased premises are permitted and made with the knowledge of the owner of the fee, his interest is subject to a mechanics' lien therefor unless he expressly limited his liability by notifying the lien claimant, and such limitation is not made by merely sending the claimant to the lessee in an endeavor to get the lessee to pay for part of the repairs. *Housekeeper v. Livingstone*..... 209
2. MECHANICS' LIENS—LEASED PREMISES—LIABILITY OF TENANTS. The evidence is sufficient to sustain findings that repairs upon leased premises were not made at the request of the tenants, so as

**MECHANICS' LIENS—CONTINUED.**

to subject their interests to a mechanics' lien, where it appears that the lessor agreed to fully repair the building as rapidly as possible and the lessees simply demanded that the repairs be made without further delay or they would get someone else to make them. *Housekeeper v. Livingstone*..... 209

3. **MECHANICS' LIENS—NOTICE—AMENDMENT—SUFFICIENCY OF ORDER.**  
In an action to foreclose a mechanics' lien, leave to amend a complaint which set forth an indefinite notice of lien does not authorize the filing of an amended notice of lien, under Bal. Code, § 5904, authorizing the amendment of a notice by order of the court, and a notice filed without leave is properly treated as an original notice, and is insufficient if not filed in time. *Brown v. Trimble*..... 270

**MEMORANDA:**

As authority to execute contract of sale, see **BROKERS**, 1, 2.  
Required by statute of frauds, see **FRAUDS, STATUTE OF**, 3-5.

**MINES AND MINERALS:**

Power of trustees to sell entire corporate property, see **CORPORATIONS**, 8.

**MINORS:**

Minority as interrupting limitation, see **LIMITATION OF ACTIONS**.

**MISCONDUCT:**

Of attorney, ground for disbarment, see **ATTORNEY AND CLIENT**.  
Of counsel, see **TRIAL**, 3.

**MISJOINDER:**

Of legal and equitable causes of action, see **QUIETING TITLE**, 1.

**MISREPRESENTATION:**

Affecting validity of sale, see **SALES**, 1, 2.

**MISTAKE:**

Hostility of possession under mistake of title, see **ADVERSE POSSESSION**, 1.  
As ground for cancellation of instruments, see **CANCELLATION OF INSTRUMENTS**.  
Ground for reformation of instrument, see **REFORMATION OF INSTRUMENTS**.

**MODIFICATION:**

Of order of condemnation on review by certiorari, see **EMINENT DOMAIN**, 7, 8.  
On appeal of final order of distribution of estate, see **EXECUTORS AND ADMINISTRATORS**, 6.

**MONEY PAID:**

1. **MONEY PAID — LIENS FOR — EJECTMENT — LIEN FOR ADVANCES.** A lien for moneys, advanced by a trustee in compromising a foreclosure suit for the benefit of defendants, cannot be asserted by innocent purchasers from the trustee, in their action of ejectment, upon their failure to sustain their title, especially where the advancement was made as a gift or in discharge of a legal obligation. *Holly Street Land Co. v. Beyer*..... 422

**MONEY RECEIVED:**

Recovery of price paid for land, see **VENDOR AND PURCHASER**, 6, 7.

**MORTGAGES:**

- Of personal property, see **CHATTEL MORTGAGES**.  
 Admissibility of foreclosure judgment to establish title of plaintiff, see **FORCIBLE ENTRY AND DETAINER**.  
 Homestead in public lands, see **PUBLIC LANDS**, 1.

**MOTIONS:**

- Presentation of objections for review, see **APPEAL AND ERROR**, 4.  
 To dismiss appeal, see **APPEAL AND ERROR**, 21.  
 Quash or vacate attachment, see **ATTACHMENT**, 2, 3.  
 To quash indictment or information, see **INDICTMENT AND INFORMATION**.  
 To open or vacate judgment, see **JUDGMENT**, 2.

**MUNICIPAL CORPORATIONS:**

- Certiorari to review proceedings of municipal officers, see **CERTIORARI**, 2.  
 Sufficiency of title to acts, relating to municipal government, see **STATUTES**, 3.
1. **MUNICIPAL CORPORATIONS — VOID ORDINANCES — REVIEW — FRANCHISES — REMEDIES.** The remedy against a void act of a city council in granting a franchise over private property on the supposition that it is a public highway is not by review of the ordinance, but by judicial proceedings against persons entering on the land. *Tenny v. Seattle Electric Co.*..... 150
  2. **MUNICIPAL CORPORATIONS — STREET IMPROVEMENTS — ASSESSMENTS — PROPERTY LIABLE — STREET RAILWAY FRANCHISES.** Under Bal. Code, § 796, authorizing the assessment of lots, blocks or parcels of land that may be benefited by a municipal improvement, a street railway company's right of way and trackage upon a street, cannot be assessed where it did not own the fee in the street, but only held a franchise for its use for a limited time. *Seattle v. Seattle Electric Co.* ..... 599

## MUNICIPAL CORPORATIONS—CONTINUED.

3. MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—SPECIAL ASSESSMENTS—OBJECTIONS—TIME FOR TAKING. Objections to an assessment for a local improvement, in that the plans provide for a rock cut forty feet wide at a cost of \$5,300, while the petition was for a cut thirty feet wide at a cost not to exceed \$3,600, and that wives of community property holders did not sign the petition, go to the regularity and correctness of the decision, within Laws 1901, p. 240, and thereunder no appeal from the assessment can be taken unless written objections to the assessment roll are filed with the city council; hence a protest prior to assessment is insufficient. *Renard v. Spokane* ..... 345
4. SAME—MANNER OF OBJECTING. The statute requiring written objections to a special assessment is mandatory, oral objections at the hearing being insufficient. *Renard v. Spokane*..... 345
5. MUNICIPAL CORPORATIONS—ASSESSMENTS—COLLATERAL ATTACK. A special assessment may be attacked collaterally where the city had no power to make any levy for the purpose, although no objections were made before the city council. *Vreeland v. Tacoma*..... 625
6. SAME—POWER TO LEVY ASSESSMENT—NATURE OF IMPROVEMENT—WATER MAINS—CHARTER—CONSTRUCTION. A city of the first class having general power to levy special assessments for local improvements, and to determine what work shall be done on that plan, may levy assessments for the construction of water mains, although that subject is not generally mentioned; and a provision limiting the amount to be expended for streets and sewers does not restrict the power to those subjects, especially where charter regulations respecting the method of assessment for street improvements, expressly refers to all other public improvements when the cost is to be charged against the property. *Vreeland v. Tacoma*..... 625
7. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—PROCEEDINGS—BONDS—VALIDITY. Bonds for a municipal water system, authorized at a special election, are invalid where the ordinance proposed for their payment a fund created by seventy-five per cent of the gross revenues of the existing system sufficient to pay accruing interest to January 1, 1909, and thereafter by diverting \$175,000 per annum, exclusive of revenues from water used for municipal purposes, and the proposition submitted to the voters was to pay into the fund \$175,000 out of the gross revenues of the system without any deductions; the statute requiring that the plan for raising revenues be submitted to the voters. *Aylmore v. Seattle*..... 42
8. SAME. A statute requiring a "fixed proportion" of the revenues from a water system to be set apart to meet accruing interest and the obligation as it matures, is not complied with by setting aside \$175,000 out of the gross revenues or out of seventy-five per cent of the gross revenues. *Aylmore v. Seattle*..... 42

## MUNICIPAL CORPORATIONS—CONTINUED.

9. SAME—INJUNCTION AGAINST ISSUANCE OF BONDS—DEFENSES. It is not an answer to a suit to enjoin the issuance of municipal bonds that the voter is not injured if the city grants less than the vote authorized; since defects or irregularities interfere with an advantageous sale of the bonds. *Aylmore v. Seattle*..... 42
10. SAME—SALE OF BONDS—TIME FOR PAYMENT. It is not a valid objection to the issuance of municipal bonds that the city agreed with the purchaser that the bonds were not to be paid for until the money was needed in the prosecution of the work contemplated. *Aylmore v. Seattle* ..... 42
11. MUNICIPAL CORPORATIONS—INDEBTEDNESS—LIMIT. Bonds payable out of the revenues of a water system do not constitute part of the general municipal indebtedness, to be considered in determining its debt limit. *Dean v. Walla Walla*..... 75
12. SAME—ADDITIONAL INDEBTEDNESS—COMPUTATION. Bonds issued for the purchase of water works, payable out of the city's general fund, may be considered as part of the five per cent additional indebtedness allowed by the constitution for water, light, and sewer purposes, although the city had not reached its five per cent limit for general indebtedness. *Dean v. Walla Walla*..... 75

## MURDER:

See HOMICIDE, 1-4.

## NAVIGABLE WATERS:

Bodies and streams of water not capable of navigation, see WATERS AND WATER COURSES.

## NECESSITY:

For condemnation for public use, see EMINENT DOMAIN, 1, 2, 5, 6.  
 For administration of estate, see EXECUTORS AND ADMINISTRATORS, 1.  
 Of tender to maintain action for specific performance, see SPECIFIC PERFORMANCE, 2.

## NEGLIGENCE:

Of carrier as to passenger, see CARRIERS, 2, 3, 5.  
 Of passenger, see CARRIERS, 4.  
 In burning slashing, see FIRES, 1.  
 Risks assumed by servant, see MASTER AND SERVANT, 19, 24-26.  
 Care required of master as to minor servant, see MASTER AND SERVANT, 15, 18.  
 Contributory negligence of servant, see MASTER AND SERVANT, 13, 15, 19, 25, 27.  
 Of employers, see MASTER AND SERVANT, 5, 8, 10, 11, 14-16, 18, 26.  
 Of servant as ground for discharge, see MASTER AND SERVANT, 3.  
 Liability for negligent acts of officers or agents, see SCHOOLS AND SCHOOL DISTRICTS, 1.

## NEGLIGENCE—CONTINUED.

1. NEGLIGENCE—PROXIMATE CAUSE—DANGERS ATTRACTIVE TO CHILDREN—EXPLOSIVES. A corporation engaged in selling explosives, which throws a large number of dynamite caps along a path frequented by school children, who were liable to pick them up and explode them in some manner, is not relieved from liability by reason of the fact that a boy, eleven years of age, undertook to explode the caps by contact with dry batteries found by him in an alley; such fact not being an intervening cause constituting a defense, or the proximate cause of the injury; the method employed for causing an explosion being a matter of detail. *Akin v. Bradley Engineering & Machinery Co.* ..... 97
2. SAME—CONCURRENT NEGLIGENCE. In such a case, the negligence of a third party in leaving the dry batteries where they could be found by children would be a concurrent rather than an intervening cause. *Akin v. Bradley Engineering & Machinery Co.* ..... 97
3. SAME—CONTRIBUTORY NEGLIGENCE. It is a question for the jury whether a boy eleven years old was guilty of contributory negligence in attempting to explode dynamite caps by contact with dry batteries. *Akin v. Bradley Engineering & Machinery Co.* ..... 97
4. NEGLIGENCE—DANGEROUS PREMISES—TRAPDOOR—CONTRIBUTORY NEGLIGENCE. A customer in a store is not guilty of contributory negligence, as a matter of law, in falling down a trapdoor, at the back of a store room near a counter where goods were displayed, where she stepped back from the counter to make room for a clerk, and did not know of the existence of, or see, the trapdoor. *Stone v. Smith-Premier Typewriter Co.* ..... 204
5. SAME—PARTIES LIABLE. In an action by a customer of one of two occupants of a storeroom against two occupants of the premises, for damages sustained in falling down a trapdoor at the side of the room visited by the customer, a nonsuit is properly directed as to the occupant of the other side of the room, where it is not shown that he had any control over the trapdoor other than a mere license to use it, and it is not shown who left the door open. *Stone v. Smith-Premier Typewriter Co.* ..... 204
6. NEGLIGENCE—DANGEROUS PREMISES—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. An inspector of a steel building in course of construction assumed the risks and is guilty of contributory negligence precluding any recovery from a subcontractor who gave an assurance of safety, where it appears that it was part of his duty to carefully examine every piece of material, and see that it was properly riveted, and that, relying on the contractor's statement that all pieces were riveted, he undertook to cross a high beam and was injured by reason of its not being riveted, it appearing that the defect was obvious to casual inspection, and one which it was his duty to detect, and which he testified he would have seen if he had looked. *McClellan v. Gerrick*.... 524

**NEGOTIABLE INSTRUMENTS:**

See **BILLS AND NOTES.**

**NEW PARTIES:**

See **PARTIES, 1.**

**NEWSPAPERS:**

**LIBEL**, see **LIBEL AND SLANDER.**

**NEW TRIAL:**

Review of discretionary ruling on motion, see **APPEAL AND ERROR, 24.**

Opening or vacating judgment, see **JUDGMENT, 2.**

Right to question right to office by motion for new trial, see **JUSTICES OF THE PEACE.**

1. **NEW TRIAL—EXCESSIVE VERDICT—REMISSION.** Upon a verdict for \$25,544 for damages for personal injuries, it is not error to grant a new trial unless the plaintiff would remit all sums in excess of \$6,544, where the verdict was excessive unless a substantial reduction was remitted, regardless of whether \$6,544 was too large or too small. *McOwen v. Seattle Electric Co.*..... 362

**NEXT OF KIN:**

See **DESCENT AND DISTRIBUTION.**

**NONRESIDENTS:**

Necessity of appearance as condition to dissolution of attachment, see **ATTACHMENT, 3.**

**NONSUIT:**

See **DISMISSAL AND NONSUIT.**

**NOTICE:**

Of appeal, see **APPEAL AND ERROR, 11, 12.**

Failure to join in notice as ground for dismissal of appeal, see **APPEAL AND ERROR, 10.**

Motion to dismiss appeal, see **APPEAL AND ERROR, 21.**

By receiver of assessments on unpaid stock, see **CORPORATIONS, 5.**

Proof of service, see **EMINENT DOMAIN, 21, 22.**

Time to present claims, see **EXECUTORS AND ADMINISTRATORS, 3, 4.**

Of injury to insurer, see **INDEMNITY, 4.**

Of application for guardian as affecting sale of incompetent's real property, see **INSANE PERSONS.**

Appointment of guardian for lunatic, see **INSANE PERSONS.**

Upon publisher for retraction of libelous publication, see **LIBEL AND SLANDER, 2.**

Of termination of relation, see **MASTER AND SERVANT, 1.**

To master of defects in appliances, see **MASTER AND SERVANT, 8.**

Defects or danger as element of assumption or risk by servant, see **MASTER AND SERVANT, 18, 24.**

**NOTICE—CONTINUED.**

- Of limitation of liability for lien for repairs, see **MECHANICS' LIENS**, 1.
- Of lien claim, see **MECHANICS' LIENS**, 3.
- In foreclosure of delinquency tax certificate, see **TAXATION**, 3.
- Affecting *bona fides* of purchaser of land, see **VENDOR AND PURCHASER**, 5.
- Necessity of notice to revoke parol license to use of water for irrigation, see **WATERS AND WATER COURSES**, 8.
- Effect of notice of appropriation of waters, see **WATERS AND WATER COURSES**, 4, 5.

**NUISANCE:**

- Injunction against abatement, see **INJUNCTION**, 1.
- By tenant, right to abate by termination of lease, see **LANDLORD AND TENANT**, 2.

**OBJECTIONS:**

- Review as dependent on objection made on trial, see **APPEAL AND ERROR**, 8.
- To proceedings on execution sale, see **EXECUTION**, 2, 4.
- To assessment for local improvements, see **MUNICIPAL CORPORATIONS**, 3-5.
- To pleadings and waiver thereof, see **PLEADING**, 6, 7.
- To admission of evidence, see **TRIAL**, 1, 2.

**OBSTRUCTIONS:**

- Of water course, see **WATERS AND WATER COURSES**, 7.

**OCCUPATION:**

- Sufficiency of occupation to constitute adverse possession, see **ADVERSE POSSESSION**, 3.
- Construction of contract in restraint of occupation, see **CONTRACTS**, 4.
- As creating relation of landlord and tenant, see **LANDLORD AND TENANT**, 1.

**OFFICERS:**

- Criminal liability in dealings with corporation and its stock, see **CORPORATIONS**, 1-3.
- Justices of the peace, see **JUSTICES OF THE PEACE**.
- 1. **OFFICERS—SALARIES—INCREASE—CONSTITUTIONAL LAW—COUNTY ENGINEERS.** Laws of 1907, changing the title of the county surveyor to county engineer, and changing his compensation from \$5 per day for the time employed to a fixed salary per year, violates Const. art. 2, § 25, providing that the "compensation" of "any public officer" shall not be increased or diminished during his term of office, Const. art. 11, § 8, prohibiting such increase, etc., of the "salary" of "county officers" under like circumstances; as the two provisions must be construed together. *State ex rel. Funke v. Board of Commissioners of Pierce County*..... 461

**OFFICERS—CONTINUED.**

2. **SAME—INCREASE OF DUTIES.** A county engineer is not entitled to a legislative increase of his salary during his term of office because of increase of his duties, where the new duties are incidental to the functions of his office, such as making the office one of record, and requiring it to be kept open at all times as other county offices of record are kept open. *State ex rel. Funke v. Board of Commissioners of Pierce County*..... 461

**OPINIONS:**

Evidence of nonexpert as to insanity, see **CRIMINAL LAW**, 4.

**ORAL CONTRACTS:**

See **FRAUDS, STATUTE OF**, 3, 4.

**ORDER OF PROOF:**

In criminal prosecution, see **CRIMINAL LAW**, 8.

**ORDERS:**

Review of appealable orders, see **APPEAL AND ERROR**, 2, 3, 5.

Modification of order of condemnation, see **EMINENT DOMAIN**, 7, 8.

Distribution of estate, see **EXECUTORS AND ADMINISTRATORS**, 5, 6.

Construction of order continuing temporary injunction, see **INJUNCTION**, 2.

Vacation of order setting aside homestead, see **JUDGMENT**, 2.

**ORDINANCES:**

Municipal ordinances, see **MUNICIPAL CORPORATIONS**, 1, 7.

**OWNERSHIP:**

Evidence of ownership of property converted, see **TROVER AND CONVERSION**, 2.

**PARENT AND CHILD:**

Custody of children on divorce, see **DIVORCE**, 2.

**PAROL AGREEMENTS:**

Effect and requirements of statute of frauds, see **FRAUDS, STATUTE OF**, 1-4.

**PAROL EVIDENCE:**

See **EVIDENCE**, 6-9.

To establish resulting trust, see **TRUSTS**, 1.

**PARTIES:**

On appeal or writ of error, see **APPEAL AND ERROR**, 9, 10.

In action by receiver to recover unpaid stock subscriptions, see **CORPORATIONS**, 6.

Criminal prosecutions, see **CRIMINAL LAW**, 1.

**PARTIES—CONTINUED.**

Right of stranger to object to parol evidence as varying writing, see EVIDENCE, 6.

Necessity of wife as party to mortgage of separate property, see HUSBAND AND WIFE, 1.

Liability for liens, see MECHANICS' LIENS, 2.

In suit to quiet title, see QUIETING TITLE.

Joinder of wife in husband's conveyance of trust property, see TRUSTS, 2.

1. **PARTIES—ADDING NEW PARTIES—TRIAL—DISCRETION.** In an action to quiet title, it is discretionary to deny an application by plaintiff, made after resting and after the defendants had put in part of their evidence, for leave to file a complaint in intervention on behalf of one not a party, in order to litigate the validity of a deed not questioned theretofore on the trial. *Johnson v. Conner*..... 431
2. **PARTIES—DEFECTS—WAIVER.** A defect of parties is waived where the same is not raised by demurrer, answer, or otherwise in the court below. *Budlong v. Budlong*..... 645

**PARTITION:**

Laches as bar to action by tenant in common, see EQUITY.

**PARTNERSHIP:**

Declarations of partner as evidence of authority, see EVIDENCE, 2.

1. **PARTNERSHIP—AUTHORITY OF PARTNER—SCOPE OF BUSINESS.** The purchase of lumber by a transportation copartnership, operating steamers on the Yukon river, is within the scope of the authority of one of the resident managing partners, although the company did not do a trading business, where the lumber was used by the partnership in the construction of a warehouse to be used in its business. *Merrill v. O'Bryan*..... 415
2. **PARTNERSHIP—CONTRACTS—INDIVIDUAL LIABILITY.** A member of an alleged copartnership, who signed a contract of employment, is liable thereon, whether or not the partnership existed or he had authority to execute the contract for the partnership, as between the parties to the contract, when the rights of the alleged copartners were not before the court. *Perkins v. Peirce*..... 380

**PATENTS:**

To Indians, see INDIANS.

**PAYMENT:**

See TENDER.

Part payment as accord and satisfaction, see ACCORD AND SATISFACTION.

Sufficiency and effect of tender of amount due after default, see CHATTEL MORTGAGES, 7, 8.

**PAYMENT—CONTINUED.**

- Delay in payment as constituting fraud on execution sale, see **EXECUTION**, 1.
- Deposit in court, who entitled to, see **GARNISHMENT**.
- Of rent by tenant, pleading and evidence in action of unlawful detainer, see **LANDLORD AND TENANT**, 3, 4.
- Right to assert lien for money advanced, see **MONEY PAID**.
- Of municipal bonds, see **MUNICIPAL CORPORATIONS**, 10.
- Default in payment as ground for rescission of contract, see **SALES**, 4.
- Taxes, see **TAXATION**, 3, 7.
- Estoppel to object to mode of paying note, see **TENDER**, 1.
- Recovery of price paid for land, see **VENDOR AND PURCHASER**, 6, 7.

**PERFORMANCE:**

- Of oral contract, effect, see **FRAUDS, STATUTE OF**, 4.
- Of contract of sale, see **SALES**, 4, 5.
- Of contract for sale or purchase of land, see **VENDOR AND PURCHASER**, 1-3, 8.

**PERMISSION:**

- To occupy land already held as showing tenancy, see **LANDLORD AND TENANT**, 1.

**PERSONAL INJURIES:**

- See **CARRIERS; NEGLIGENCE**.
- Inadequate and excessive damages, see **DAMAGES**, 1, 2.
- Parol evidence to explain release of causes of action, see **EVIDENCE**, 9.
- Indemnity insurance, release of insurer, see **INSURANCE**, 4.
- To employee, see **MASTER AND SERVANT**.
- Reduction of excessive verdict or new trial, see **NEW TRIAL**.
- Liability of school district for negligent act of agents, see **SCHOOLS AND SCHOOL DISTRICTS**, 1.

**PERSONAL PROPERTY:**

- Wrongful conversion, see **TROVER AND CONVERSION**.

**PETITION:**

- Description of property in condemnation proceedings, see **EMINENT DOMAIN**, 9.

**PHYSICIANS AND SURGEONS:**

- Sufficiency of information charging manslaughter through malpractice of physician, see **HOMICIDE**, 5.
  - Confidential communication between physician and patient, see **WITNESSES**, 5.
1. **PHYSICIANS AND SURGEONS—DENTISTRY—PRACTICE—REGULATIONS—CONSTITUTIONAL LAW.** The statutory requirement that an applicant for a license to practice dentistry shall present a diploma from a dental college in good standing, before taking his examination, is

PHYSICIANS AND SURGEONS—CONTINUED.

- not so unreasonable or arbitrary as to infringe any constitutional right. *State ex rel. Thompson v. State Board of Dental Examiners* ..... 291
2. PHYSICIANS AND SURGEONS—PRACTICING DENTISTRY—CRIMINAL LAW—EVIDENCE—SUFFICIENCY. The evidence is sufficient to sustain a conviction for practicing dentistry without a license where it appears that defendant, who had no license, made a new mouth plate for the prosecuting witness at the agreed price of \$5, and in order to take an impression and fit the plate, extracted a tooth, although no independent charge was made for extracting the tooth; since taking the impression was in itself the practicing of dentistry. *State v. Thompson* ..... 683
3. SAME—REQUIREMENT OF LICENSE—CONSTITUTIONAL LAW. Bal. Code, § 3032 prohibiting the practice of dentistry without a license is not unconstitutional. *State v. Thompson*..... 683

PLACE:

Construction of contract of sale as to place of delivery, see SALES, 3.

PLATS:

Sufficiency for purpose of condemnation by boom company, see EMINENT DOMAIN, 12.

PLEADING:

See ARBITRATION AND AWARD.

In action to foreclose laborer's lien, see AGRICULTURE, 1.

Dismissal of appeal for failure to file bill of particulars, see APPEAL AND ERROR, 22.

Right to raise objection to complaint for first time on appeal, see APPEAL AND ERROR, 23.

Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 27.

Amendment on reversal of judgment, see APPEAL AND ERROR, 44.

To recover deposits, see BANKS AND BANKING, 4.

On bills or notes, see BILLS AND NOTES.

In action for injuries to passengers, see CARRIERS, 3.

For damages in general, see DAMAGES, 3.

Action to enforce claim against estate, see EXECUTORS AND ADMINISTRATORS, 4.

Proceedings to restrain judgment on ground of entry on holiday, see JUDGMENT, 1.

For unlawful detainer by tenant, see LANDLORD AND TENANT, 3.

Actions for libel or slander, see LIBEL AND SLANDER, 1.

In action by servant for personal injuries, see MASTER AND SERVANT, 9, 17.

In action for deceit, see SALES, 1.

## PLEADING—CONTINUED.

1. PLEADING—AMENDMENT—TO CONFORM TO PROOF—DAMAGES. In an action for personal injuries, in which the complaint alleges certain items of special damages, and prays for a sum in excess thereof, it is proper to allow a trial amendment alleging general damages in a sum equal to the difference between the special damages and the sum prayed for, where proof of general damages was admitted without objection, and the defendant did not move for a continuance on making its claim of surprise. *Lobb v. Seattle, Renton & Southern R. Co.* ..... 238
2. PLEADING—BILL OF PARTICULARS—SERVICES OF ATTORNEY. In an action by an attorney for services, it is error to require the plaintiff to file a bill of particulars placing a valuation on each item of the service, where the employment was all in one continuous matter and it appeared that the services were so blended together and related to each other that it was impossible to separate one service from another; since bills for the services of an attorney stand upon a different footing from other claims. *Moore v. Scharnikow*..... 564
3. PLEADING—ISSUES AND PROOF—WORK AND LABOR. Proof that services were performed and a bill rendered therefor, which was stated to be satisfactory, sustains a recovery either on contract or on a *quantum meruit* for the services. *Wright v. Lake*..... 469
4. PLEADING—ISSUES AND PROOF. One who waives a defense set out in her answer, and is permitted to offer proof of another defense which she fails to establish, and thereupon seeks relief under the defense that had been waived, cannot object that the court went out of the issues in the cause in deciding equities to which the parties appeared to be entitled under the evidence. *Budlong v. Budlong* 645
5. SAME—COLLISION OF STREET CARS—PRESUMPTIONS—PLEADING AND PROOF—SPECIFIC ALLEGATIONS. The fact that the plaintiff was unable to prove the particular cause of a collision of street cars, as set forth in her complaint, does not deprive her of the benefit of the presumption that negligence is presumed from the happening of a collision, since that was alone the substance of the issue, and the particular cause alleged need not be proved. *Lobb v. Seattle, Renton & Southern R. Co.*..... 238
6. PLEADING—DEMURRER TO COUNTERCLAIM—WAIVER. A demurrer to a counterclaim, on the ground that it did not arise out of the same transaction as the cause set out in the complaint, is waived by the admission, without objection, of evidence in support of the counterclaim. *Reynolds v. Dickson*..... 407
7. PLEADING—DEMURRER—EVIDENCE. A demurrer to a complaint is waived by answering to the merits. *Budlong v. Budlong*..... 645

## PLEDGES:

See CHATTEL MORTGAGES.

**POLICE POWER:**

Of state, see CONSTITUTIONAL LAW, 1, 2.

**POLICY:**

Of insurance, see INSURANCE.

**POSSESSION:**

See ADVERSE POSSESSION.

Of mortgagee as affecting title of mortgagor, see CHATTEL MORTGAGES, 3.

As establishing *prima facie* title by showing of prior possession, see EJECTMENT, 2.

To support suit to quiet title, see QUIETING TITLE.

**POSTING:**

Of notice of appropriation, effect of failure, see WATERS AND WATER COURSES, 5.

**POWERS:**

Of city to levy assessment for local improvement, see MUNICIPAL CORPORATIONS, 6.

Of state tax commission to classify railroads and fix rate of assessment, see TAXATION, 1, 2.

**PRACTICE:**

See APPEAL AND ERROR; ATTACHMENT; CERTIORARI; COSTS; DISCOVERY; DIVORCE; EXECUTION; JUDGMENT; NEW TRIAL; PLEADING; TENDER; TRIAL.

**PREJUDICE:**

Ground for reversal in civil actions, see APPEAL AND ERROR, 25-31.

At trial as constituting reversible error, see TRIAL, 3, 4, 7, 8.

**PRESCRIPTION:**

See WATERS AND WATER COURSES, 2.

**PRESENTMENT:**

Of claim against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 3, 4.

**PRESUMPTIONS:**

Upon collateral attack of judgment against bankrupt, see BANKRUPTCY, 1.

As to negligence from collision of street cars, see CARRIERS, 3.

Of notice to creditors, see EXECUTORS AND ADMINISTRATORS, 4.

As to regularity in entry of judgment, see JUDGMENT, 1.

Of negligence from collision of cars, see PLEADING, 5.

Assessment of property for taxation, see TAXATION, 2.

**PRICE:**

Deduction for partial failure of title, see **VENDOR AND PURCHASER**, 3, 4.

**PRINCIPAL AND ACCESSORY:**

See **CRIMINAL LAW**, 1.

**PRINCIPAL AND AGENT:**

See **BROKERS**.

Construction of agreement to employ, see **CONTRACTS**, 3.

Agent of foreign corporation, see **CORPORATIONS**, 10.

**PRINCIPAL AND SURETY:**

Liability of surety on bond on appeal, see **APPEAL AND ERROR**, 12.

Bond as evidence authorizing establishment of branch bank, see **BANKS AND BANKING**, 2.

**PRIORITIES:**

Of mortgages, see **CHATTEL MORTGAGES**, 1, 2.

In appropriation of waters for irrigation, see **WATERS AND WATER COURSES**.

**PRIVILEGED COMMUNICATIONS:**

Disclosure by witness, see **WITNESSES**, 5.

**PROBATE:**

Certiorari to review probate proceedings, see **CERTIORARI**, 1.

**PROCESS:**

Foreign corporations, see **CORPORATIONS**, 10.

Condemnation proceeding, see **EMINENT DOMAIN**, 21, 22.

In foreclosure of delinquency tax certificate, see **TAXATION**, 4-6.

**PROHIBITION:**

1. **PROHIBITION—REMEDY BY APPEAL.** Prohibition does not lie to prevent the trial of a cause after erroneously refusing to grant a voluntary dismissal; since there is an adequate remedy by appeal. *State ex rel. Korsstrom v. Superior Court*..... 671

**PROMISE:**

To repair defective machinery, see **MASTER AND SERVANT**, 8.

**PROMISSORY NOTES:**

See **BILLS AND NOTES**.

**PROOF:**

Of loss in action on fire insurance policy, see **INSURANCE**, 3.

Of amount of conversion as affecting total damages for loss from obstruction of stream and conversion, see **LOGS AND LOGGING**.

Issues and proof, see **PLEADING**.

**PROPERTY:**

- Adverse possession, see ADVERSE POSSESSION.
- Taking for public use, see EMINENT DOMAIN.
- Property subject to condemnation, see EMINENT DOMAIN, 2, 11.
- Transfer of personalty in fraud of creditors, see FRAUDULENT CONVEYANCES.
- Homicide in defense of property, see HOMICIDE, 1.
- Insurable interest, see INSURANCE, 1.
- Nature of property liable to assessment for public improvements, see MUNICIPAL CORPORATIONS, 2.
- Sales of personalty, see SALES.

**PROXIMATE CAUSE:**

- Of injury, see MASTER AND SERVANT, 14, 16; NEGLIGENCE, 1, 2.

**PUBLIC DEBT:**

- Municipal bonds, see MUNICIPAL CORPORATIONS, 7-12.
- Limitation of municipal debt, issuance of bonds as part of indebtedness, see MUNICIPAL CORPORATIONS, 11, 12.

**PUBLIC IMPROVEMENTS:**

- By cities, see MUNICIPAL CORPORATIONS.
- Validity of statutes as dependent on expression of subject in title, see STATUTES, 3.

**PUBLIC LANDS:**

- Acquisition by adverse possession, see ADVERSE POSSESSION, 1, 4, 5.
  - Acquisition of public lands in contravention of public policy, see CONTRACTS, 2.
  - Condemnation of right of way granted to another railroad company, see EMINENT DOMAIN, 1-3.
  - Homestead settled upon before man's marriage as separate property, see HUSBAND AND WIFE, 1.
  - Indian lands, see INDIANS.
  - Appropriation of water rights, see WATERS AND WATER COURSES, 1-6.
1. PUBLIC LANDS—HOMESTEAD—MORTGAGE. A homestead claimant may mortgage the homestead after final proof, before the issuance of a patent. *Rogers v. Minneapolis Threshing Machine Co.*.... 19
  2. PUBLIC LANDS—GRANTS IN AID OF RAILROADS. Act of Congress of June 26, 1906, declaring the forfeiture of all railroad rights of way theretofore granted under act March 3, 1875, where the railroad has not been constructed and the period of five years has elapsed since its location, as provided for in the earlier act, is effective and complete as a forfeiture without any other or further proceedings on the part of the government; and the questions of fact may be inquired into by any judicial proceedings involving right claimed under the original grant. *Columbia Valley R. Co. v. Portland & Seattle R. Co.*..... 472

## PUBLIC LANDS—CONTINUED.

3. PUBLIC LANDS—TIDE LANDS—VACATION OF PLATS—STATUTES—REPEAL. The county commissioners have no jurisdiction to vacate plats of tide lands, under Laws 1903, p. 139, conferring authority upon them to vacate plats generally; since, if such law applied to tide land plats, it was superseded two days later by Laws 1903, p. 239, conferring power upon the state board of land commissioners to vacate plats of tide lands. *State ex rel. Oregon & Washington R. Co. v. Abraham*..... 215

## PUBLIC POLICY:

Validity of contracts, see CONTRACTS, 2.

## PUBLIC SCHOOLS:

See SCHOOLS AND SCHOOL DISTRICTS.

## PUBLIC USE:

Condemnation of property devoted to public use, see EMINENT DOMAIN, 1-3.

Taking property for public use, see EMINENT DOMAIN, 14.

## PURCHASE:

Attempt to purchase as condition precedent to condemnation, see EMINENT DOMAIN, 13.

## QUASHING:

Attachment, see ATTACHMENT, 2-4.

## QUESTION FOR JURY:

See MASTER AND SERVANT, 13, 14, 20, 21, 25.

Construction of contract of employment, see CONTRACTS, 3.

In prosecution for homicide, see HOMICIDE, 2.

Contributory negligence in exploding dynamite caps, see NEGLIGENCE, 3.

In civil actions, see TRIAL, 4.

## QUIETING TITLE:

Property acquired at judicial sale, collateral attack on judgment, see JUDGMENT, 3.

1. QUIETING TITLE—ACTIONS—JOINDER. In an action to quiet an equitable title, there is no misjoinder of equitable and legal causes of action by reason of the fact that plaintiff was in possession of part of the land, and out of possession of other portions; since an equitable suit to establish equitable rights by one out of possession is the proper form of action, without resorting to ejectment. *Carlson v. Curren* ..... 249

**QUIETING TITLE—CONTINUED.**

2. **QUIETING TITLE—PARTIES DEFENDANT—JOINDER.** There is no misjoinder of parties defendant in an action to quiet title to a single estate by reason of the fact that the defendants are severally in possession and claim adversely separate portions of the estate. *Carlson v. Curren*..... 249

**QUO WARRANTO:**

See **JUSTICES OF THE PEACE.**

**RAILROADS:**

- Carriage of goods and passengers, see **CARRIERS.**
- Injuries to passengers on street car, see **CARRIERS, 2-5.**
- Exercise of power of eminent domain, see **EMINENT DOMAIN, 1-8, 18, 19.**
- Injuries to employees from defective equipment of cars, see **MASTER AND SERVANT, 5-7.**
- Liability of property to assessment for public improvements, see **MUNICIPAL CORPORATIONS, 2.**
- Grants of land in aid, see **PUBLIC LANDS, 2.**
- Taxation of railroad property, see **TAXATION, 1, 2.**

**RAPE:**

- Testimony of physician as privileged communication, see **WITNESSES, 5.**
- 1. **RAPE—EVIDENCE—INTENT—STATEMENTS OF DEFENDANT.** In a prosecution for rape, a statement by defendant antedating the commission of the crime is admissible, where it showed his state of mind and intention to commit the crime. *State v. Winnett*..... 93
- 2. **RAPE—EVIDENCE—CORROBORATION—SUFFICIENCY.** There is sufficient corroborative evidence, within Laws 1907, p. 396, requiring a prosecutrix for rape to be corroborated by evidence which "tends to convict the defendant of the commission of the offense," where, in addition to evidence of similar acts during several years, circumstances and conditions showing opportunity at the time in question, and testimony of a physician establishing the fact of intercourse for a considerable period, it appeared that the defendant advised his wife to induce the prosecuting witness to leave the state, and his admissions showed that he had often taken liberties with the person of the prosecutrix. *State v. Jonas*..... 133

**RATIFICATION:**

Of operation of branch bank, instructions, see **BANKS AND BANKING, 5.**

**REAL ACTIONS:**

Actions for recovery of real property founded on possession, see **EJECTMENT.**  
50—48 WASH.

**REAL ESTATE AGENTS:**

See **BROKERS**.

**REAL PROPERTY:**

Competency of owner to testify as to value of real property, see **EVIDENCE**, 10.

Sale of real estate of decedent to pay claims, see **EXECUTORS AND ADMINISTRATORS**, 7, 8.

Effect of statute of frauds on agreement relating to real property, see **FRAUDS, STATUTE OF**.

Minority as affecting limitation of action for recovery of, see **LIMITATION OF ACTIONS**.

Conveyance, see **VENDOR AND PURCHASER**.

**REASONABLE CAUSE:**

Necessity of recital of in findings, see **ATTACHMENT**, 4.

**RECEIVERS:**

Dismissal of order appointing temporary receiver, see **APPEAL AND ERROR**, 5.

Action to enforce unpaid subscriptions to stock of insolvent corporation, see **CORPORATIONS**, 4-7.

**RECORDS:**

Transcript on appeal or writ of error, see **APPEAL AND ERROR**, 4, 14, 20.

Records as evidence, see **EVIDENCE**, 3.

**REDUCTION:**

Of excessive verdict on grant of new trial, see **NEW TRIAL**.

**REFORMATION OF INSTRUMENTS:**

1. **REFORMATION OF INSTRUMENTS—MISTAKE IN DEED—EVIDENCE.**

Reformation of a deed upon the ground of a mistake in the description, which is denied by the opposite party, will not be granted where the evidence is not clear and convincing or the mistake is not established beyond a reasonable doubt. *Hapeman v. McNeal* 527

**RELATIONSHIP:**

See **LANDLORD AND TENANT**, 1.

Tribal relations of Indian, see **INDIANS**, 2.

Creation and termination, see **MASTER AND SERVANT**, 1, 2.

**RELEASE:**

See **ACCORD AND SATISFACTION**.

Change in corporate name as affecting subscribers to capital stock, see **CORPORATIONS**, 7.

Of insurer against liability for personal injuries, see **INSURANCE**, 4.

**RELEVANCY:**

Of evidence in civil actions, see **EVIDENCE**, 1.

**REPAIRS:**

Mechanics' lien for, see **MECHANICS' LIENS**, 1, 2.

**REPEAL:**

Of statute authorizing vacation of tide land plats, see **PUBLIC LANDS**, 3.

**REPLEVIN:**

Keeping tender good by deposit in court, see **TENDER**, 2.

**REPUTATION:**

Of accused as evidence, see **CRIMINAL LAW**, 2.

**RESCISSION:**

Cancellation of written instrument, see **CANCELLATION OF INSTRUMENTS**.

Of contract for sale of goods, see **SALES**.

Of contract for sale of land, see **VENDOR AND PURCHASER**, 1, 6.

**RES JUDICATA:**

See **JUDGMENT**, 4-6.

Former decision as law of the case on subsequent appeal, see **APPEAL AND ERROR**, 43.

Conclusiveness of order settling administrator's final account, see **EXECUTORS AND ADMINISTRATORS**, 9.

**RESULTING TRUSTS:**

See **TRUSTS**.

**REVENUE:**

See **TAXATION**.

Application of to meet municipal obligations and interest accruing, see **MUNICIPAL CORPORATIONS**, 7, 8.

**REVIEW:**

By higher court by appeal for errors or irregularities, see **APPEAL AND ERROR**.

Statutory writ of review, see **CERTIORARI**.

Of discretion in allowing amendment of complaint, see **MASTER AND SERVANT**, 17.

Of void proceedings granting franchise, see **MUNICIPAL CORPORATIONS**, 1.

**REVIVAL:**

Of offense of adultery after condonation, see **DIVORCE**, 1.

**RIPARIAN RIGHTS:**

Condemnation of, see **EMINENT DOMAIN**, 11, 15.

Reasonable use of water, see **WATERS AND WATER COURSES**, 6, 7.

**RISKS:**

Assumed by employee, see **MASTER AND SERVANT**, 19, 24-26.

**SAFE PLACE TO WORK:**

See **MASTER AND SERVANT**, 5, 16, 17.

**SALARY:**

Of county engineer, subject and title of act, see **STATUTES**, 4.

**SALES:**

Exercise of power of sale in chattel mortgage, see **CHATTEL MORTGAGES**, 4, 5, 7, 8.

Parol evidence to vary contract of sale, see **EVIDENCE**, 7, 8.

On execution, see **EXECUTION**.

Of property of decedent under order of court, see **EXECUTORS AND ADMINISTRATORS**, 7, 8.

Of property in fraud of creditors, see **FRAUDULENT CONVEYANCES**.

Right to counterclaim in action to rescind sale and cancel chattel mortgage, see **SETOFF AND COUNTERCLAIM**.

Tax sales, see **TAXATION**.

Of real property, see **VENDOR AND PURCHASER**.

1. **SALES—FRAUD—ACTION FOR DECEIT—RELIANCE ON REPRESENTATIONS—DUTY TO INVESTIGATE—PLEADINGS—COMPLAINT—SUFFICIENCY.** A complaint in an action for damages for deceit in a trade whereby two rival printing establishments in the same city were consolidated, is demurrable for failure to state sufficient facts, where it appears that the vendee and vendor were business managers and stockholders in the rival companies, that the stock on hand alleged to be misrepresented in value was at hand, and there was no allegation that plaintiff could not have conveniently investigated the same and the representations as to outstanding debts, nor that the defendant concealed the property or induced plaintiff to refrain from making an investigation of the stock and financial standing of defendant's company; since no fiduciary relations existed and means of knowledge was equally open to both parties. *Pigott v. Graham*..... 348
2. **SALES—RESCISSION BY VENDEE—FRAUD—EVIDENCE—SUFFICIENCY.** Proof of fraud in the sale of a stock of goods, in that the invoice price was concealed and misrepresented by the vendors, is not sufficiently definite and convincing, where it appeared that, although the vendor's invoice book could not be found, from which the amount of goods on hand at the time of the sale could have been ascertained, the vendees had been in possession for five months, selling and adding to the stock, and keeping no account which would show what proportion of the goods had been sold, and there was no testimony showing fraud or conspiracy, and from the whole evidence the court could only hazard a guess as to the actual amount of goods delivered. *Reynolds v. Dickson*..... 407

## SALES—CONTINUED.

3. **SALES—PLACE OF DELIVERY—CONTRACTS—CONSTRUCTION.** An agreement whereby the seller of shingles in carload lots guaranteed a fixed weight per thousand, paying the freight if in excess, and receiving what was saved if the actual weight were less, which adjustment was made after arrival of the car at its destination, does not show that delivery was to be made at the point of destination, where the buyer had control of the car after it was loaded. *Chicago Lumber & Coal Co. v. McCann*..... 174
4. **SALES—CONDITIONAL SALES—PERFORMANCE—RESCISSION BY VENDOR—DEFAULT IN PAYMENT—EXCUSES—FAILURE OF VENDOR'S TITLE.** The vendor of chattels under a conditional sale cannot rescind the contract or recover possession on account of the vendee's default in making payments, where the default was due to the vendor's inability and refusal to convey a perfect title, and tender of the amount due was made on condition of receiving an unencumbered title to the property purchased. *Gennelle v. Boulais*..... 310
5. **SALES—CONTRACT—BREACH—SUBSTANTIAL PERFORMANCE.** An agreement by the vendor of a threshing machine that the same might be paid for by threshing all his grain until payment was completed is substantially performed, where the vendor, after threshing 15,000 bushels of his own grain, upon demand for a credit to that extent, offered to obtain for the vendees the threshing of 15,000 bushels of the same quality upon an adjoining farm, in lieu of his own, as a payment on the machine, where it is not shown that any special privilege would be derived from the threshing of his own, or that the vendees could have obtained the threshing on the adjoining farm but for such arrangement. *Hatch v. Hall*..... 109
6. **SALES—DELIVERY—TIME FOR COMPLIANCE WITH ORDER.** An order for a safe, to be shipped "as soon as possible" is complied with where no finished safes were in stock when the order was received, but one in the course of manufacture was rushed to completion with diligence and shipped nineteen days after receipt of the order. *Victor Safe & Lock Co. v. O'Neil*..... 176
7. **SAME—WITHDRAWAL OF ORDER—ACTION FOR PRICE—DEFENSES.** A conditional threat to withdraw an order for a safe, if not found to be as represented, or unless the same should be submitted to a test, does not amount to a withdrawal of the order in law which would constitute a defense to an action for the price. *Victor Safe & Lock Co. v. O'Neil*..... 176
8. **SALES—ACTIONS—EVIDENCE—SUFFICIENCY.** In an action to recover a balance due for lumber sold and delivered, findings for the plaintiff are sufficiently supported by evidence of a conversation with one of the defendants in which he admitted that the lumber was received and the account correct. *North Pacific Lumber Co. v. Carroll*... 163

## SALES—CONTINUED.

9. **SALES—ACTION FOR PRICE—DEFENSES—BREACH OF WARRANTY.** Upon a defense of breach of warranty in an action for the purchase price of horses sold, the defendants need not prove *scienter*, and it is error to instruct that the burden was on defendants to show that the vendor knew that the facts warranted were false, even though the answer also pleaded deceit and false representations. *Ford v. Smith* ..... 398
10. **SAME—TRIAL—INSTRUCTIONS.** Error in such an instruction is not cured by the fact that it might have been applicable in an action for deceit. *Ford v. Smith*..... 398
11. **SALES—ACTION FOR PRICE—EVIDENCE—ADMISSIBILITY—QUALITY OF GOODS.** Where, upon a claim of a breach of a warranty of shellac sold for finishing furniture, defendants in an action for the price had introduced evidence tending to show that it was adulterated and worthless and that it flaked and chipped off after it had been treated with a glue preparation, it is competent for the plaintiff to show in rebuttal that, at defendant's request, a witness had sold an inferior quantity of glue to them, which if used on the furniture would have produced the effects ascribed by the defendant to the quality of the shellac, there being direct evidence that the shellac was of good quality. *Fuller & Co. v. Harris*..... 519
12. **SAME—TRIAL—INSTRUCTIONS—ERRORS CURED—BREACH OF WARRANTY—DELAY IN MAKING CLAIM.** It is not prejudicial error to instruct that delay for a long time in asserting a claim for damages for breach of warranty for shellac sold is a circumstance against the good faith of the claim, where a further instruction was given to the effect that the party was under no obligation to return the property on discovery of the breach but could retain the same and recover his damages, in the absence of any request for any other instructions on the subject or any explanation of the instruction complained of. *Fuller & Co. v. Harris*..... 519

## SCHOOLS AND SCHOOL DISTRICTS:

1. **SCHOOL DISTRICTS—LIABILITY FOR PERSONAL INJURIES—GOVERNMENTAL FUNCTIONS.** A school district is liable for the negligent act and omissions of its officers or agents whereby a bucket of hot water, used in connection with the heating apparatus of a school-room, is overturned and a pupil burned or scalded, under Bal. Code, §§ 5673, 5674, authorizing actions against a school district for an injury arising from some act or omission of the district, the statute applying to governmental functions. *Redfield v. School District No. 3* ..... 85
2. **SCHOOLS AND SCHOOL DISTRICTS—TEACHERS—ELIGIBILITY—ACTIONS—WAGES—CERTIFICATE AS CONDITION PRECEDENT.** Under Bal. Code, §§ 2322 and 2416, requiring a certificate as a condition precedent to the right to enter upon an employment as a school teacher and pro-

**SCHOOLS AND SCHOOL DISTRICTS—CONTINUED.**

viding the necessary steps to obtain the same, a letter from the county superintendent stating that a teacher's papers are sufficient to entitle him to a certificate and that one will be issued on application as provided by statute, is not the equivalent of a certificate, and an action for wages will not lie where at the time of making the contract and entering upon the service no certificate had been obtained. *Kester v. School District No. 34 of Walla Walla County*. 486

**SECURITY:**

For costs, see **COSTS**, 2.

**SENTENCE:**

Suspension of attorney for misconduct, see **ATTORNEY AND CLIENT**, 3.

**SEPARATE PROPERTY:**

Of husband or wife, see **HUSBAND AND WIFE**.

**SERVANTS:**

See **MASTER AND SERVANT**.

**SERVICE:**

Of employee, see **MASTER AND SERVANT**, 4.

**SET-OFF AND COUNTERCLAIM:**

As ground for objecting to discontinuance, see **DISMISSAL AND NON-SUIT**.

1. **SETOFF AND COUNTERCLAIM—CLAIMS ARISING FROM SAME TRANSACTION.** In an action to rescind a sale and cancel a chattel mortgage given by the plaintiffs, a counterclaim setting up the mortgage and seeking its foreclosure is so connected with the cause of action that it may be properly interposed. *Reynolds v. Dickson*..... 407

**SETTLEMENT:**

Of administrator's account, right to assert error in subsequent orders, see **EXECUTORS AND ADMINISTRATORS**, 9.

**SIGNATURES:**

To memorandum taking transaction out of operation of statute of frauds, see **FRAUDS, STATUTE OF**, 2.

**SLANDER:**

See **LIBEL AND SLANDER**.

**SPECIFIC PERFORMANCE:**

Of contract to convey land, see **VENDOR AND PURCHASER**, 2.

1. **SPECIFIC PERFORMANCE—TENDER—SUFFICIENCY.** Where a broker is authorized to make a contract of sale, a tender of the price to the agent is sufficient, when the owner is absent from the state, to entitle the purchaser to specific performance. *Degginger v. Martin*.. 1

**SPECIFIC PERFORMANCE—CONTINUED.**

2. **SAME—NECESSITY.** Where the owner repudiates a sale made by an agent, tender of the price is not a condition precedent to an action for specific performance. *Degginger v. Martin*..... 1

**SQUATTERS:**

See **ADVERSE POSSESSION**, 1-3.

Right to acquire riparian rights, see **WATERS AND WATER COURSES**, 6.

**STATEMENT:**

Of case or facts for purpose of review, see **APPEAL AND ERROR**, 14-17, 20.

**STATE TAX COMMISSION:**

Power to fix rate of assessment for taxation of railroad property, see **TAXATION**, 1, 2.

**STATUTES:**

See **FRAUDS, STATUTE OF**.

Class legislation and interference with natural rights and liberties, see **CONSTITUTIONAL LAW**.

Partial invalidity as affecting whole act, see **CONSTITUTIONAL LAW**, 2.

Dissolution of corporation, see **CORPORATIONS**, 9.

Foreign corporations, right to do trust and brokerage business, see **CORPORATIONS**, 10, 11.

Distribution of estate of decedent, next of kin, see **DESCENT AND DISTRIBUTION**.

Assessments for construction and maintenance of drains, see **DRAINS**, 2.

Proceedings to take property for public use, see **EMINENT DOMAIN**, 15, 22.

Sales of property in fraud of creditors, see **FRAUDULENT CONVEYANCES**.

Statutes of limitation, see **LIMITATION OF ACTIONS**.

Repeal of law authorizing vacation of tide land plats, see **PUBLIC LANDS**, 3.

Construction of act providing for written instructions, see **TRIAL**, 5.

Relating to appropriation of waters, see **WATERS AND WATER COURSES**, 1, 6.

1. **STATUTES—TITLES AND SUBJECTS.** The failure of the title of an act to indicate that the act carries a penalty for violation of its provisions, does not necessarily invalidate the act as containing more than one subject not expressed in the title. *State v. Merchant*.. 69
2. **SAME—SUFFICIENCY OF TITLE — CORPORATIONS — OFFICERS—LIABILITY.** The title of an act limited to the protection of "stockholders or other persons dealing with the corporation," is not sufficiently broad to include provisions making it a penal offense to issue false statements to persons "dealing with the stock of the corporation,"

**STATUTES—CONTINUED.**

- and the act is void as to such provisions, although valid as to its provisions relating to dealings with the corporation, and is not restricted to dealings with "stockholders" only. *State v. Merchant* 69
3. **STATUTES—EMBRACING MORE THAN ONE SUBJECT—MUNICIPAL CORPORATIONS—IMPROVEMENTS.** Laws 1905, p. 300, giving additional power to cities with respect to public utilities, does not violate the constitutional prohibition against embracing more than one subject from the fact that it authorizes cities to acquire and conduct distinct public utilities, such as water works, sewerage systems, light and power plants, and railways, which are independent of each other. *Aylmore v. Seattle*..... 42
  4. **STATUTES—TITLE—SUFFICIENCY.** The title of an act "changing the title of county surveyor to county engineer, relating to the election, powers, and duties of such office," is sufficiently broad to include the subject of his salary. *State ex rel. Funke v. Board of Commissioners of Pierce County*..... 461
  5. **STATUTES—CONSTRUCTION.** Laws of 1907, p. 351, relating to county engineers and their salaries, containing no express statement that the salary provision was intended to have immediate effect upon engineers theretofore elected and qualified, should not be held to have so intended, if it would thereby be unconstitutional. *State ex rel. Funke v. Board of Commissioners of Pierce County*..... 461
  6. **STATUTES—LEGISLATIVE CONSTRUCTION.** A legislature has no power to construe the act of its predecessor, and no such construction is attempted where the act in question was reenacted without change, and other provisions adopt an entirely new system of procedure. *Great Northern R. Co. v. Snohomish County*..... 478

**STAY:**

Pending appeal or writ of error, see **APPEAL AND ERROR**, 12, 13.

**STENOGRAPHERS:**

Stenographic report as constituting instructions in writing, see **TRIAL**, 5.

**STOCK:**

Corporate stock, see **CORPORATIONS**.

**STREET RAILROADS:**

Injuries to passengers, see **CARRIERS**, 2-5.

**SUBMISSION:**

To arbitrators by agreement of parties, see **ARBITRATION AND AWARD**.

**SUBSCRIPTION:**

To corporate stock, see **CORPORATIONS**, 4-7.

**SUMMONS:**

In tax foreclosure proceedings, see **TAXATION**, 4-6.

**SUPERSEDEAS:**

On appeal or writ of error, see **APPEAL AND ERROR**, 12, 13.

**SUPPORT:**

Of children, see **DIVORCE**, 4.

Allowance to surviving wife or children, see **EXECUTORS AND ADMINISTRATORS**, 2.

**SUPPRESSION:**

Attempt to suppress evidence as corroborative circumstance, see **WITNESSES**, 10.

**SURFACE WATERS:**

See **WATERS AND WATER COURSES**.

**SURPRISE:**

Ground for continuance, see **CONTINUANCE**.

**SUSPENSION:**

Of prohibitory injunction, see **APPEAL AND ERROR**, 13.

Of attorney, see **ATTORNEY AND CLIENT**.

**TAXATION:**

Payment of taxes as proof of adverse possession, see **ADVERSE POSSESSION**, 2, 5-7.

By drainage districts, see **DRAINS**.

Municipal improvements, see **MUNICIPAL CORPORATIONS**.

1. **TAXATION—LEVY AND ASSESSMENT—RAILROADS—MODE OF ASSESSMENT—EQUALITY—POWERS OF STATE TAX COMMISSION.** The "general supervision" over county assessors and boards of equalization, given to the state board of tax commissioners by Laws 1905, p. 224, is not restricted to advisory acts, but empowers the commissioners to classify intercounty railroads for the purpose of taxation and to fix the rate of assessment therefor, in view of other constitutional and statutory provisions making intercounty railroads an entirety for the purpose of assessment and requiring that the entire value be apportioned between the several counties in proportion to mileage and that the assessment be equalized between the different counties so that equality of taxation shall be secured; and an assessment of intercounty railroads by the assessor of one county, at a different and higher rate per mile than that adopted in all other counties by order of the state board of tax commissioners, is manifestly unequal and void. *Great Northern R. Co. v. Snohomish County*..... 478

**TAXATION—CONTINUED.**

2. **SAME—PRESUMPTIONS.** Such an assessment cannot be sustained upon the presumption that all other property in such county was assessed proportionally higher than in other counties, in view of the requirement that property be assessed at its true value. *Great Northern R. Co. v. Snohomish County*..... 478
3. **TAXATION—FORECLOSURE AND SALE—DEFENSES—PAYMENT OF TAX.** A tax deed, upon foreclosure of a delinquency certificate, is void, where, long before the date of delinquency, the owner sent the county treasurer more than enough money to pay all taxes, receipt for which was duly issued, and the certificate of delinquency was issued by mistake of the treasurer, and foreclosure and sale were had without actual notice to the owner. *Loving v. McPhail*..... 113
4. **TAXATION—FORECLOSURE—SUMMONS—NAME OF OWNERS.** The fact that taxing officers, in issuing certificates of delinquency and publishing notice on foreclosure, knew or by reasonable diligence could have ascertained the true ownership, does not invalidate a tax judgment and deed secured upon summons by publication against unknown owners, where the property was assessed to unknown owners or the name of the owner left blank; since the proceeding is in rem and the statute, Bal. Code, §§ 1699, 1749, does not require the officer to use diligence to ascertain the ownership. *Shipley v. Gaffner*. 169
5. **TAXATION—FORECLOSURE—SUMMONS—SUFFICIENCY.** Upon the foreclosure of a tax certificate, a summons by publication which fails to state the year of the date of the first publication is too indefinite and uncertain to authorize a judgment of default. *McLean v. Lester* 213
6. **TAXATION—FORECLOSURE OF LIEN—SUMMONS—DESCRIPTION OF PROPERTY—SUFFICIENCY.** A summons for publication in a tax foreclosure proceeding does not describe the property with reasonable accuracy where a lot is described as in "Syndicate Add," without giving the name of any city or town, and there are in the county several syndicate additions; and judgment of foreclosure is void, where the description appears differently in the summons, judgment and deed, and the owner had no notice of the proceeding and had paid taxes for the last ten years. *Welch v. Beacon Place Co.* 449
7. **TAXATION—PAYMENT—OMISSION OF TAXING OFFICERS.** A tax sale and deed thereunder is void, where the owner in good faith applied to the proper officers for a statement of the taxes due, paid all that was demanded, and full payment was prevented by the mistake or fault of the officers. *Taylor v. Debritz*..... 373

**TEACHERS:**

See SCHOOLS AND SCHOOL DISTRICTS.

**TENANCY IN COMMON:**

Divorce as affecting right of adverse possession of community property, see ADVERSE POSSESSION, 6.

**TENDER:**

After default of amount due on chattel mortgage, sufficiency and effect, see **CHATTEL MORTGAGES**, 7, 8.

Necessity of tendering expense of insurance to mortgagee, see **CHATTEL MORTGAGES**, 6.

In action for specific performance of contract for sale of land, see **SPECIFIC PERFORMANCE**.

1. **TENDER—BILLS AND NOTES—MEDIUM OF PAYMENT—ESTOPPEL.** Where tender of a draft of the amount due on a note payable in gold coin is not objected to at the time upon that ground, it cannot afterwards be urged that the tender was insufficient because not made in gold. *Hidden v. German Savings and Loan Society*..... 384
2. **TENDER—KEEPING GOOD—PAYMENT INTO COURT—REPLEVIN.** In an action of claim and delivery for property wrongfully sold under a chattel mortgage, the tender of the amount due on the mortgage before foreclosure sale, entitling the plaintiff to the property, need not be kept good by bringing the money into court. *Thomas v. Seattle Brewing & Malting Co.*..... 560

**TERMINATION:**

Right to abate nuisance by termination of lease, see **LANDLORD AND TENANT**, 2.

Of relation, see **MASTER AND SERVANT**, 1.

**THREATS:**

To institute criminal prosecution, elements of offense, see **EXTORTION**.

**TIDE LANDS:**

Vacation of plats by county commissioners, see **PUBLIC LANDS**, 3.

**TIME:**

Giving of oral notice of appeal, see **APPEAL AND ERROR**, 11.

For service of bill of exceptions, see **APPEAL AND ERROR**, 19.

For filing statement of facts, see **APPEAL AND ERROR**, 20.

For motion to dissolve attachment, see **ATTACHMENT**, 3.

For presentation of claims against decedent's estates, see **EXECUTORS ADMINISTRATORS**, 3, 4.

Filing informations, see **INDICTMENT AND INFORMATION**.

For motion to quash indictment, see **INDICTMENT AND INFORMATION**.

For entry of judgment, see **JUDGMENT**, 1.

For objections to assessment for local improvement, see **MUNICIPAL CORPORATIONS**, 3.

Delivery of goods sold, time for compliance with order, see **SALES**, 6.

For objections to admission of evidence, see **TRIAL**, 2.

**TITLE:**

Color of title, see **ADVERSE POSSESSION**, 4.

Effect of possession on title of mortgagor, see **CHATTEL MORTGAGES**, 3.

**TITLE—CONTINUED.**

- To maintain ejectment, see **EJECTMENT**.
- Admissibility of foreclosure judgment to show title, see **FORCIBLE ENTRY AND DETAINER**.
- Removal of cloud, see **QUIETING TITLE**.
- Of vendor as excuse for nonperformance of contract, see **SALES**, 4.
- Of statutes, see **STATUTES**, 1-4.
- Sufficiency of title of vendor of land, see **VENDOR AND PURCHASER**, 2.

**TORTS:**

- See **FORCIBLE ENTRY AND DETAINER**; **LIBEL AND SLANDER**; **NEGLIGENCE**; **TROVER AND CONVERSION**.
- In carriage of passengers, see **CARRIERS**, 2-5.
- Damages, inadequate or excessive, see **DAMAGES**, 1, 2.
- Liability for negligent acts of officers and agents, see **SCHOOLS AND SCHOOL DISTRICTS**, 1.
- Obstruction and detention of natural water courses, see **WATERS AND WATER COURSES**, 7.

**TRAPDOORS:**

- Care required as to trapdoors, see **NEGLIGENCE**, 4, 5.

**TRIAL:**

- Review of question as dependent on presentation in lower court, see **APPEAL AND ERROR**, 7, 23.
- Review of ruling as dependent on presentation of objection in lower court, see **APPEAL AND ERROR**, 8, 11.
- Review of rulings as dependent on presentation of same by record, see **APPEAL AND ERROR**, 14, 15, 18.
- Necessity for incorporating instruction in bill of exceptions, see **APPEAL AND ERROR**, 16.
- Review of rulings involving discretion of court, see **APPEAL AND ERROR**, 24.
- Review of rulings as dependent on prejudicial nature of error, see **APPEAL AND ERROR**, 27-31.
- Conclusiveness of findings on conflicting evidence, see **APPEAL AND ERROR**, 36-38.
- Error in exclusion of evidence cured by subsequent admission or instructions to jury, see **APPEAL AND ERROR**, 42.
- Submission of controversies to arbitration, see **ARBITRATION AND AWARD**.
- Necessity of findings as to reasonable cause, see **ATTACHMENT**, 4.
- Instructions in action to recover deposits in branch bank, see **BANKS AND BANKING**, 5.
- Instructions in action for injuries to passengers, see **CARRIERS**, 2.
- Review on certiorari, see **CERTIORARI**.
- Continuance in civil actions, see **CONTINUANCE**.
- Adding new parties, see **PARTIES**, 1.

## TRIAL—CONTINUED.

- Amendment of pleading during trial, see PLEADING, 1.
  - Construction and operation of contract, see CONTRACTS, 3, 4.
  - In criminal prosecutions, see CRIMINAL LAW.
  - Motions and grounds for new trial, see NEW TRIAL.
  - Answers to interrogatories, see DISCOVERY.
  - Voluntary dismissal of action, see DISMISSAL AND NONSUIT.
  - Instructions in condemnation proceedings, see EMINENT DOMAIN, 17, 18.
  - Consistency of findings in action for damages, see FIRES, 2.
  - Examination of juror, see JURY.
  - Instructions in action for personal injuries to servant, see MASTER AND SERVANT, 19, 23.
  - Prohibiting trial of cause, see PROHIBITION.
  - Instruction in action for breach of warranty, see SALES, 9, 11, 12.
  - Instructions in action for conversion of logs, harmless error, see TROVER AND CONVERSION, 3.
  - Attendance and examination of witnesses, see WITNESSES.
1. TRIAL—RECEPTION OF EVIDENCE—OBJECTIONS—WAIVER. Where upon objection to testimony, offer of other proof is made, and the objection is modified in such a way as to lead the court and counsel to believe that the first objection is waived, it cannot be urged as error, although no waiver was intended. *Pearce v. Greek Boys' Mining Co.* ..... 38
  2. TRIAL—RECEPTION OF EVIDENCE—TIME FOR OBJECTION. An objection to parol evidence of a deed, on the ground that there was no sufficient evidence of its loss, is waived if not made when the parol evidence was offered. *Holly Street Land Co. v. Beyer*..... 422
  3. TRIAL—MISCONDUCT OF COUNSEL—ARGUMENT. Argument of counsel going beyond legitimate limits is not ground for reversal where the trial judge rebuked counsel and removed any prejudice the jury may have received. *Barclay v. Puget Sound Lumber Co.*..... 241
  4. TRIAL—QUESTIONS FOR JURY—WITHDRAWAL OF ISSUE. Where there was no evidence to support an allegation that the insufficiency of a belt shifter was a proximate cause of the accident, it is reversible error to submit the issue to the jury and to refuse a requested instruction withdrawing the same. *Tergeson v. Robinson Manufacturing Co.* ..... 294
  5. TRIAL—INSTRUCTIONS IN WRITING—STATUTES—CONSTRUCTION. Where a stenographic report of instructions to the jury is made by a stenographer employed by both parties, he is sufficiently under the control of the court to constitute his report "instructions in writing," within the meaning of Laws 1903, p. 119, § 1, requiring written instructions upon demand, provided that a stenographic report of the charge shall be considered a charge in writing. *Collins v. Huffman* ..... 184

**TRIAL—CONTINUED.**

6. **TRIAL—BEFORE THE COURT—ADMISSION OF EVIDENCE.** Upon the trial of a cause before a court without a jury, testimony offered should be liberally received, to avoid the necessity of a reversal in case of a trial *de novo* on appeal. *Degginger v. Martin*..... 1
7. **TRIAL—INSTRUCTIONS—PREJUDICE.** Instructions as to damages, if the jury find "any at all" in a case in which nominal damages were conceded, did not mislead the jury where they found substantial damages. *Collins v. Huffman*..... 184
8. **SAME—BONDS—ACTIONS—DAMAGES.** In an action upon injunction bonds for damages by reason of being deprived of the control of a business, no prejudice results from the fact that the instructions inadvertently failed to permit recovery of damages for a certain day, where it was not shown that there was any change of conditions or particular damages sustained on such day. *Collins v. Huffman* ..... 184

**TROVER AND CONVERSION:**

Conversion of mortgaged property, see **CHATTEL MORTGAGES**, 5.  
 Conversion of logs, see **LOGS AND LOGGING**.

1. **TROVER AND CONVERSION—EVIDENCE—ADMISSIBILITY.** In an action of trover for the value of property sold under attachment against a third person, evidence as to the merits of the attachment suit is irrelevant. *Greenwood v. Corbin*..... 357
2. **SAME—EVIDENCE OF PLAINTIFF'S OWNERSHIP—SUFFICIENCY.** In an action for the conversion of a team, harness, wagon, and tools, under attachment proceedings against plaintiff's father, the evidence is sufficient to show ownership in the plaintiff, and it was error to dismiss the action, where it appears from uncontradicted evidence that one of the horses was given to the plaintiff by his father on his twenty-first birthday, and the other articles were purchased by him with his own money, although there was a circumstance indicating a claim of ownership made by the father. *Greenwood v. Corbin*..... 357
3. **TROVER AND CONVERSION—DEFENSES—PERMISSION TO CUT LOGS—INSTRUCTION.** In an action for the wrongful conversion of logs, it is harmless error to instruct that the burden of proof was upon the defendant to show that logs, admittedly taken and cut, were cut by permission of the plaintiff, where the defendant did not claim to have paid for them, and their value was undisputed. *Shields v. Doty Lumber & Shingle Co.*..... 679
4. **SAME—MEASURE OF DAMAGES.** The measure of damages for logs converted or lost by the wrongful acts of the defendant is the value of the logs. *Shields v. Doty Lumber & Shingle Co.*..... 679

**TRUST COMPANIES:**

Right of foreign corporation to do trust business, construction of articles, see **CORPORATIONS**, 11.

**TRUSTEES:**

Power to sell entire corporate property, see **CORPORATIONS**, 8.

**TRUSTS:**

Creation by will, see **WILLS**.

1. **TRUSTS—RESULTING TRUSTS—PAROL EVIDENCE TO ESTABLISH.**

There is an exception to the rule that a trust in real property cannot be proved by parol, where an effort was made to oust parties in possession claiming adversely, and the trustee intervened for their benefit, taking a quitclaim deed in his own name for convenience; since equity will not permit such a trustee to assert title against the persons for whose benefit it was acquired. *Holly Street Land Co. v. Beyer* ..... 422

2. **TRUSTS—DEED BY TRUSTEE—JOINDER BY WIFE.** Where property is acquired by a married man as trustee for another, his wife need not join in a conveyance thereof. *Holly Street Land Co. v. Beyer* 422

**UNDUE INFLUENCE:**

Evidence to show undue influence in obtaining contract, see **CONTRACTS**, 1.

**UNKNOWN OWNERS:**

Assessment of property to unknown owner, see **TAXATION**, 4.

**UNLAWFUL DETAINER:**

See **FORCIBLE ENTRY AND DETAINER; LANDLORD AND TENANT**, 3-4.

**VACATION:**

Of attachment, see **ATTACHMENT**, 2-4.

Sale of decedent's property, see **EXECUTORS AND ADMINISTRATORS**, 8.

Of tide land plats, see **PUBLIC LANDS**, 3.

**VALUE:**

Of land appropriated for public use as measure of compensation, see **EMINENT DOMAIN**, 18.

Opinion evidence as to value of property, see **EVIDENCE**, 10.

Of property converted as affecting damages for conversion, see **TROVER AND CONVERSION**, 4.

**VALUED POLICY LAW:**

See **INSURANCE**, 2.

**VENDOR AND PURCHASER:**

Sale of corporate property by trustees, see **CORPORATIONS**, 8.

Admissibility of oral evidence to show inducement for contract for sale of land, see **EVIDENCE**, 8.

Sale of property of decedents under order of court, see **EXECUTORS AND ADMINISTRATORS**, 7.

Requirements of statute of frauds, see **FRAUDS, STATUTE OF**.

VENDOR AND PURCHASER—CONTINUED.

Sale of insane person's real property, see **INSANE PERSONS**.  
 Insurable interest of vendee under contract of sale, see **INSURANCE**, 1.  
 Transfers of ownership of personal property, see **SALES**.  
 Specific performance of contract, see **SPECIFIC PERFORMANCE**.  
 Purchasers at tax sale, see **TAXATION**.  
 Sale of trust property by trustee, see **TRUSTS**, 2.

1. **VENDOR AND PURCHASER—PERFORMANCE OF CONTRACT—RESCISSION BY VENDOR—EVIDENCE—SUFFICIENCY.** Evidence examined and held to sustain findings that the purchaser of land had failed to comply with the terms of the contract, warranting rescission by the vendor. *Allen v. Treat*..... 552
2. **VENDOR AND PURCHASER—TITLE — SUFFICIENCY — ESTOPPEL — SPECIFIC PERFORMANCE.** A vendee contracting for a good title to be conveyed within a few days, knowing of the possession of squatters, which was an apparent cloud but did not invalidate the title, is estopped from excusing his nonperformance on that ground, especially where, with the cloud still existing, he afterwards seeks specific performance, which accordingly will not be granted. *Allen v. Treat* ..... 552
3. **VENDOR AND PURCHASER—CONTRACT TO CONVEY—CONSTRUCTION—PERFORMANCE—SHORTAGE OF LAND—DEDUCTION IN PRICE.** Where the vendor agrees to convey by a special warranty deed, and "reserves the right and title" until all payments are made, the vendee is entitled to a deduction for failure of title as to a portion of the tract, as the contract to "convey" is not fulfilled by a special warranty deed of land not owned by the vendor. *Baldwin v. Brown*..... 303
4. **SAME—DEDUCTION IN PRICE—AMOUNT.** Where the vendor is unable to convey an aliquot part of the land, the vendee is entitled to a deduction from the purchase price in the proportion that the value of such part bears to the whole tract. *Baldwin v. Brown*..... 303
5. **VENDOR AND PURCHASER—BONA FIDE PURCHASERS—RESERVATIONS—NOTICE.** Vendees are not *bona fide* purchasers without notice of the time allowed for the removal of reserved timber, where they had notice that the timber had been reserved through recitals in a deed through which they claimed title, and they are not entitled to rely upon the statements of their grantors as to the time for removal where inquiry would have disclosed the same. *Peterson v. Weist* 339
6. **VENDOR AND PURCHASER—REMEDIES OF VENDEE—RECOVERY OF PAYMENT—DEFENSES—TITLE—ADVERSE POSSESSION.** A contract for the purchase of real estate calling for an abstract showing perfect title may be rescinded by the vendee and payment made recovered, where the abstract shows that a strip of the lot and a wall thereon had been conveyed to the adjoining owner, who asserted title thereto; and the fact that the adjoining owner had never used the same, and

## VENDOR AND PURCHASER—CONTINUED.

- had paid no taxes, and that the vendors had been in adverse possession for the statutory period, is immaterial; since the purchaser may demand a title free from hostile claims and litigation. *Hoffman v. Titlow*..... 80
7. SAME—EVIDENCE—CORROBORATION—ADMISSIBILITY. In an action to recover purchase money paid by a vendee, after his rescission of a sale for defect in the title, evidence in corroboration of the defendant's statement that they offered to cure the defect sometime between the 22d and 25th of May, two years prior to the trial, is inadmissible when the witness cannot fix the time of the corroborative circumstance except to state that it was "a couple of years ago, somewhere about that time. I think they were figuring on the sale of the property." *Hoffman v. Titlow*..... 80
8. VENDOR AND PURCHASER—FAILURE TO CONVEY—MEASURE OF DAMAGES. The measure of damages for failure of a vendor to convey real estate sold, where the sale was induced by false representations of the vendor which the vendee had a right to rely upon, is the difference between the value of the property at the time of demand for a deed and the amount of the balance then due from the vendee. *Williams v. Hillman Investment Co.*..... 695

## VENUE:

Action against foreign corporation, see CORPORATIONS, 10.

## VERDICT:

Review on appeal or writ of error, see APPEAL AND ERROR, 32-35.

Excessive damages for personal injuries, see DAMAGES, 1, 2.

Excessive or inadequate damages for land taken for public use, see EMINENT DOMAIN, 19.

Excessive verdict in action for loss of logs by conversion and obstruction of stream, see LOGS AND LOGGING.

Excessiveness, remission or grant of new trial, see NEW TRIAL.

## VICE PRINCIPAL:

See MASTER AND SERVANT, 28.

## VOIR DIRE:

Examination of jurors, see JURY.

## VOLUNTARY NONSUIT:

See DISMISSAL AND NONSUIT.

## WAGES:

Of servant, see MASTER AND SERVANT, 4.

Of school teacher, right of action, see SCHOOLS AND SCHOOL DISTRICTS, 2.

**WAIVER:**

- Of objections to damages, see EMINENT DOMAIN, 4.
- Defects in parties, see PARTIES, 2.
- Of demurrer, see PLEADING, 6, 7.
- Admission of evidence, see TRIAL, 1.

**WARNING:**

- Admissibility of evidence to show warning of spring gun, see HOMICIDE, 3.
- Duty of master to give, see MASTER AND SERVANT, 15, 18.

**WARRANTY:**

- On sale of goods, see SALES, 9, 11, 12.

**WATERS AND WATER COURSES:**

- Works for protection or improvement of lands, see DRAINS.
- Exercise of power of eminent domain, see EMINENT DOMAIN, 11, 12, 15, 24.
- Obstruction of stream by boom, see LOGS AND LOGGING.
- Assessments for construction of water mains, see MUNICIPAL CORPORATIONS, 6.

1. WATERS—APPROPRIATION—BOGS ON PUBLIC LANDS—STATUTES—CONSTRUCTION. Pools of water in a bog or marsh on public lands, about one-half an acre in extent, occasioned by seepage water coming from a hillside, fed by no live springs, stream, or channel of water, and having no flow from the bog, are not subject to appropriation under the common law, nor under territorial laws 1873, p. 520, authorizing the appropriation of the waters of streams or creeks in Yakima county. *Dickey v. Maddux*..... 411
2. SAME—PRESCRIPTION—COMPLIANCE WITH STATUTE. No prescriptive right to waters of a bog or marsh, used since 1884, can be claimed under Laws 1891, p. 327, where there has been no attempt to comply with the provisions of such law since its enactment. *Dickey v. Maddux*..... 411
3. WATERS—APPROPRIATION—PRIORITIES—DILIGENCE. The rights of a settler upon public lands to divert the waters of a creek for the purpose of irrigation relate back to the date of the original appropriation, where the same was applied to beneficial uses with reasonable diligence. *Kendall v. Joyce*..... 489
4. SAME—NOTICE OF APPROPRIATION—EFFECT. There being no law authorizing the filing of a notice of appropriation of waters on public lands, a settler acquires no rights by settlement on the land and filing such notice in 1887, where no diversion of the water or application to beneficial uses was made until 1897, when the same had already been duly appropriated by another. *Kendall v. Joyce*.. 489

## WATERS AND WATER COURSES—CONTINUED.

5. SAME—FAILURE TO POST NOTICE. The failure of an appropriator of waters on public lands to post and record a notice of appropriation as required by Laws 1891, p. 327, does not affect the rights of an actual appropriator as against one subsequently acquiring title, the law being simply to apprise other contemplating appropriators of the first steps taken, and to preserve evidence thereof. *Kendall v. Joyce* ..... 489
6. SAME—WHO ENTITLED TO—SQUATTERS—STATUTES—CONSTRUCTION. Laws 1889-90, p. 706, assuring riparian rights for the purpose of irrigation to persons holding possessory rights to land abutting on natural streams, is simply declaratory of the existing law whereby title acquired under a patent relates back to the date of settlement; and does not enable a squatter, who abandons or sells out his possessory rights, to acquire any riparian rights, which are a mere incident to ownership of the soil and do not vest until patent issues. *Kendall v. Joyce*..... 489
7. WATERS AND WATER COURSES — RIPARIAN RIGHTS—INJUNCTIONS—NAVIGABLE WATERS—RIGHTS OF DRIVING COMPANY—ARTIFICIAL FRESHETS. A riparian owner has the right to the natural flow of a stream through its lands for the purpose of creating power for its electric light plant, and may enjoin a log driving company from retarding the flow, to the injury of such owners, for the purpose of creating artificial freshets for the driving of logs down a stream which is not navigable for the floatage of logs at certain stages without such artificial means; the driving company having acquired no right to such use by condemnation proceedings. *Kalama Electric Light & Power Co. v. Kalama Driving Co.*..... 612
8. WATERS—IRRIGATION—REVOCATION OF LICENSE—INJUNCTIONS—TEMPORARY INJUNCTION—CONDITIONS. A preliminary mandatory injunction requiring an irrigation company to deliver water from a certain ditch, pursuant to an agreement for water from its main canal, cannot be sustained on the theory that a parol license to take water from such ditch had been granted temporarily, and that it would be inequitable to allow a revocation of the license without notice; since the license may be revoked without notice, and no such injunction can be granted unless the right is clear and certain. *Lanham v. Wenatchee Canal Co.*..... 337

## WILLS:

1. WILLS—TRUST FOR CREDITORS—CONSTRUCTION. A will making the executrix a trustee for the purpose of paying creditors applies only to creditors who qualify by proving their claims, after publication of notice to creditors. *Foley v. McDonnell*..... 272

## WITNESSES:

- Opinions as to insanity, see CRIMINAL LAW, 4.  
Opinions, see EVIDENCE, 10.

WITNESSES—CONTINUED.

1. WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEASED. A widow, defending as executrix of her deceased husband's estate, does not waive her right to object to evidence by the adverse party as to transactions with the deceased by the fact that she fully testified to the same, since under our statute her testimony was competent and not barred by the statute. *O'Connor v. Slatter*..... 493
2. SAME. The prohibition of the statute against the evidence of an adverse party as to transactions had with a person deceased does not exclude evidence as to who was or was not present at the time certain notes were endorsed by the deceased. *O'Connor v. Slatter*. 493
3. WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEASED. Testimony by the adverse party as to whether notes had been changed since he received them from a person since deceased, is inadmissible, because testimony of a transaction had with the deceased, being indirectly testimony as to their condition when received from the deceased. *O'Connor v. Slatter*..... 493
4. WITNESSES—COMPETENCY—TRANSACTION WITH DECEASED. In an action to recover an interest in property as an heir of defendant's alleged wife, the defendant is incompetent to testify that he was never married to the deceased, since it would be evidence of a transaction between himself and the deceased. *Nelson v. Carlson*.... 651
5. WITNESSES—PRIVILEGE—PHYSICIANS. In a prosecution for statutory rape upon one under the age of consent, evidence as to pregnancy, by a physician who had made an examination, is admissible, where the relation of physician and patient did not exist, and no confidence was violated. *State v. Winnett*..... 93
6. SAME—TESTIMONY OF WIFE. In a prosecution for statutory rape upon one under the age of consent, who had since married the defendant, it is error to require the wife to appear in court for the purpose of being identified by a witness, when her condition as to pregnancy was apparent and could be observed by the jury, thereby in reality compelling the wife to become a witness against the defendant. *State v. Winnett*..... 93
7. SAME—CRIMINAL LAW—TRIAL—IMPROPER CONDUCT OF COUNSEL. In such a case, it is improper to call the wife to testify for the purpose of parading her condition before the jury and compelling the defendant to urge an objection which would tend to prejudice his case; and the same would be ground for reversal where it tended to prejudice the rights of the defendant. *State v. Winnett*..... 93
8. WITNESSES—CROSS-EXAMINATION—CREDIBILITY—DEGRADING WITNESS. Upon the cross-examination of a witness who had testified as to the proper manner of stopping a street car on a grade, a question as to certain charges preferred against him, upon which he was dismissed from the defendant's employ, relates to a collateral mat-

## WITNESSES—CONTINUED.

- ter which does not affect his credibility as to the fact testified to, and he may properly decline to answer; since the only purpose of the question was to expose him to disgrace. *Walters v. Seattle, Renton & Southern R. Co.*..... 233
9. WITNESSES — CREDIBILITY — INTEREST OF WITNESS—EVIDENCE—ADMISSIBILITY. Upon a trial for assault with intent to murder, a complaint in a civil action brought by the complaining witness against the accused to recover damages is properly excluded as immaterial, where the fact of the bringing of the suit had already been shown for the purpose of affecting the interest and credibility of the complaining witnesses. *State v. Constantine*..... 218
10. SAME—CONTRADICTION OF WITNESS—CRIMINAL LAW—SUPPRESSION OF EVIDENCE. Since an attempt to suppress evidence by paying money to the prosecuting witness may be shown as a corroborative circumstance against the defendant, it is error to refuse to allow the defendant to rebut evidence of such an attempt by contradicting evidence that a certain person had made such an offer on behalf of the defendant. *State v. Constantine*..... 218
11. SAME—IMPEACHMENT — LAYING FOUNDATION FOR CONTRADICTION. Where the prosecuting witnesses had testified to an attempt made by an emissary of the defendant to suppress his testimony by the payment of money, it is not necessary to lay the usual foundation for the impeachment of his evidence by calling attention of the witnesses to any particular conversation, time, and place, but he may be impeached by merely showing that the matter testified to is untrue. *State v. Constantine*..... 218
12. WITNESSES — IMPEACHMENT — CORROBORATION OF IMPEACHED WITNESS. The defendant has a right to offer evidence in support of his answer to an impeaching question, after the state has impeached it. *State v. Constantine*..... 218

## WORK AND LABOR:

Laborer's liens, see AGRICULTURE.

Contracts of employment, see MASTER AND SERVANT, 1, 2, 29.

Liens for work and materials, see MECHANICS' LIENS.

Action for services, issues and proof, see PLEADING, 3.

## WRITINGS:

As evidence, see EVIDENCE, 5.

Parol evidence to vary or contradict, see EVIDENCE, 6-9.

Required by statute of frauds, see FRAUDS, STATUTE OF.

Necessity for written objections to assessment for local improvements, see MUNICIPAL CORPORATIONS, 4.

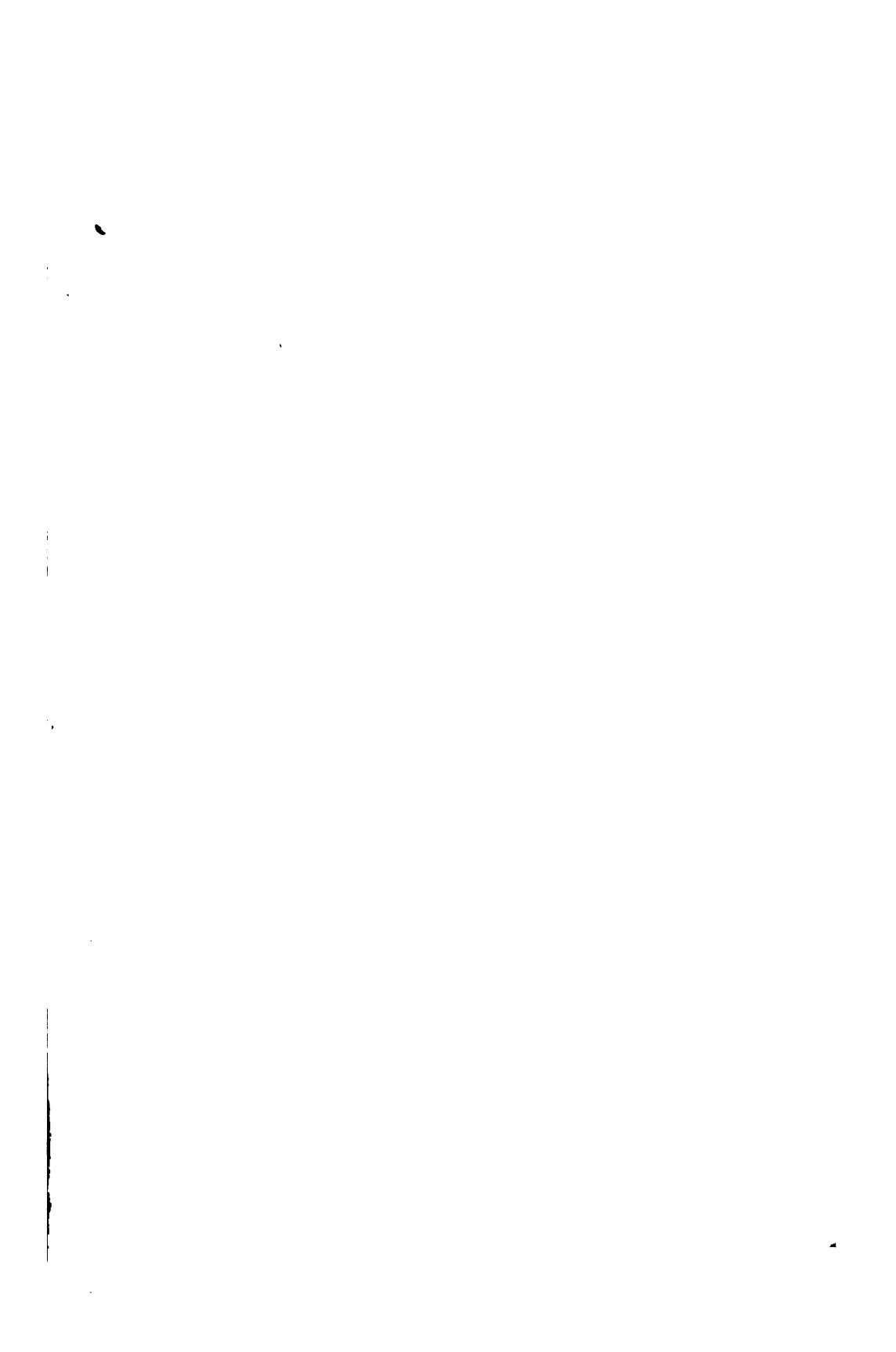
## WRITS:

See CERTIORARI; GARNISHMENT; INJUNCTION; PROHIBITION.

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